(*Id.* at 77, 240), petitioners unveiled, in blown-up form, their "Deadly Dozen" hit list of thirteen physicians, including three respondents, accusing them of "crimes against humanity." (*Id.* at 78-79, 228-30.) The Federal Bureau of Investigation and U.S. Marshals immediately contacted respondents, who, with full knowledge of the prior poster/murder pattern and petitioners' "pro-force" position, purchased bulletproof vests, wigs and disguises. (*Id.* at 78-82, 122, 228-31.)

ACLA's threats continued unabated. In August 1995, ACLA released a poster of respondent Dr. Robert Crist, with his photograph and home and work addresses, declaring him "guilty of crimes against humanity" and offering a "reward." Petitioners visited Dr. Crist's St. Louis clinic to relay their threat directly. Once again, petitioners succeeded in their intent to intimidate: Dr. Crist accepted law enforcement protection and undertook additional security measures to protect himself and his family. (Pet. App. 79, 231.)

In January 1996, ACLA unveiled "the Nuremberg Files." (Pet. App. 78-79.) Subsequently, petitioners surreptitiously sent the Nuremberg Files to Neal Horsley for placement on the internet in ACLA's name. Horsley complied, and the hardcopy files were destroyed. (*Id.* at 78-79, 231-35.) Amidst dripping blood, crossed-out names of murdered doctors and grayed names of wounded doctors, the Nuremberg Files contained Physicians' names, addresses and family information, and warned of a "payday someday, a day when what is sown is reaped." (*Id.* at 78-79, 109-10.)[6]

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[6] ACLA struggles to distance itself from the Nuremberg Files by noting that Horsley is a non-party. It is undisputed, however, that the Nuremberg Files were petitioners' creation. (Pet. App. 78-79, 232-35, 281-85.) ACLA's "Lodging" tellingly does not include the trial exhibits documenting ACLA's role in creating the Nuremberg Files or ACLA's involvement in the internet version. (*E.g.*, Exs. 4, 7B, 80.) And, Paul deParrie, petitioners' agent, was directly involved in the creation of the

B. Trial, Jury Verdict and Injunction

Fearing for their lives and the safety of their families, respondents sued, contending that petitioners' communications to Physicians were "threats of force" in violation of federal law.[7] Relying on settled threats law under multiple federal threats statutes (on which FACE was modeled), the district court denied ACLA's motions to dismiss and, after discovery, denied ACLA's motions for summary judgment. (Pet. App. 332, 400.) After three weeks of trial and four days of deliberations, the jury found that each of the Deadly Dozen List, Crist Poster and Nuremberg Files constituted "a true threat by one or more of the defendants to bodily harm, assault or kill any one of the plaintiffs." (Pet. App. 429.) The jury also found—*in response to a question in the jury verdict form proposed by ACLA*—that each petitioner "violate[d] or conspire[d] to violate FACE"; it further found that all but two petitioners violated RICO. (Pet. App. 429-444; Resp. App. 37a-67a.) Carefully assigning differing degrees of fault to each defendant, the jury awarded Physicians compensatory damages under FACE and RICO and punitive damages under FACE. (Pet. App. 429-44.)

In enjoining petitioners from further unlawful conduct, District Judge Robert E. Jones independently found,

> by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant

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Nuremberg Files and participated in the destruction of the hardcopy Files after they were sent by ACLA to Horsley. (Pet. App.124, 281-85)

[7] Physicians sued under FACE, 18 U.S.C. § 248, and RICO, 18 U.S.C. §§ 1961-1968.

> and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices or procedures.

(Pet. App. 81-82, 226-92, 294.)[8]

In its findings, the district court found both subjective and objective intent to threaten on behalf of each petitioner. (Pet. App. 81-82, 228-31, 286.) The jury's finding of intention to intimidate under FACE, as the *en banc* Ninth Circuit made clear, reflects this very same determination. (*Id.* at 75, 100-01, 111-12.)

C. ACLA's First Ninth Circuit Appeal

ACLA appealed, raising an amalgam of 35 constitutional, statutory, instructional, evidentiary and mistrial issues—but *none* of the RICO or standing arguments discussed in its certiorari petition. In an opinion by Judge Kozinski, a three-judge panel reversed on First Amendment grounds, ruling that the evidence did not establish that petitioners' posters and list conveyed the message that petitioners themselves would inflict bodily harm on respondents. The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judges Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners' conduct was not protected, as the record showed that petitioners threatened violence with intention to intimidate. The *en banc* Ninth Circuit affirmed the liability

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[8] The district court issued its injunction under FACE, which specifically authorizes private parties to obtain injunctive relief. 18 U.S.C. § 248(c)(1)(B). Respondents did not seek a RICO injunction, which distinguishes this case from *Scheidler* v. *National Organization for Women, Inc.*, 123 S. Ct. 1264 (2006); *see infra* pp. 24-27.

verdict, compensatory damages and injunction in their entirety, and remanded to the district court solely on the amount of the FACE punitive damages award.

In her opinion for the *en banc* majority, Judge Rymer carefully surveyed the uniform body of threats law developed in the Ninth Circuit and the other Circuits following this Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969), and determined that the district court properly defined "threat" for purposes of this case. (Pet. App. 93-110.) The court of appeals also held that, under well-settled law, the jury properly considered context in determining whether petitioners' statements were "true threats." (*Id.* at 106-10.) The court further found that, even were subjective intent required as a matter of constitutional law, the FACE instructions in this case required the jury to find that petitioners issued their threats with intent to intimidate respondents—that is, that they subjectively intended to cause respondents to fear bodily injury. (*Id.* at 75, 100-01, 111.)[9]

Although disagreeing with the result, the dissenting judges—Judges Reinhardt, Kozinski, O'Scannlain, Kleinfeld and Berzon—agreed that the *en banc* majority properly defined the legal standard for true threats, properly approved the jury's consideration of context, and properly held that the case required an independent review of the factual record. (Pet. App. 128-32.) The dissenting opinions simply disagreed with the

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[9] The *en banc* court also considered and rejected the other arguments raised by ACLA on appeal. (Pet. App. 112 n.16, 114 n.17, 114-19.) In particular, the *en banc* court rejected ACLA's argument—now raised again in its second certiorari petition—that no claim for conspiracy to violate FACE exists. (*Id.* at 112 n.16) The court of appeals held that because ACLA raised this issue "for the first time on appeal," and that ACLA itself had proposed the disjunctive jury verdict question, it failed on preservation grounds. The *en banc* court also held that even if it were to consider this waived argument, it would not find in ACLA's favor because no "substantial injustice occurred." (*Id.*) *See infra* pp. 29-30.

application of those settled legal standards to the particular facts of this case. (*E.g.*, *id.* at 128-29.)[10]

D. ACLA's First Certiorari Petition

After its request for *en banc* rehearing by the full Ninth Circuit was denied, on October 8, 2002, ACLA filed a petition for a writ of certiorari with this Court, raising the very same First Amendment questions, as well as the same FACE conspiracy question, that are presented again by the present petition.[11] Physicians opposed certiorari. On December 16, 2002, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States as to whether certiorari should be granted. After this Court issued its decision in *Black*, the Solicitor General, on May 30, 2003, filed his brief expressing the United States's view that the *en banc* Ninth Circuit "applied a legal standard for distinguishing 'true threats' from protected speech that is correct and consistent with this Court's decisions" and that for this and other reasons the petition should be denied. (Resp. App. 8a.)[12] ACLA and Physicians also filed supplemental briefs addressing the impact

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[10] In addition to joining Judge Kozinski's dissent, which agreed with the majority's articulation of threats law and standard of review, Judges Reinhardt and Berzon authored separate dissents. Judge Reinhardt argued that "political speech" deserves "heightened scrutiny." (Pet. App. 127-128.) Judge Berzon advocated a subjective intent standard, which, as noted, was met in this case. (*Id.* at 166-70.)

[11] ACLA's *amici* raised not only these First Amendment and FACE conspiracy questions, but also the same RICO and standing questions raised by the present petition. *See supra* note 3.

[12] The Solicitor General's brief recognized that, because the jury was required to—and did—find that each petitioner acted with subjective intent under the FACE statute, this case is "not a suitable vehicle" to address the question whether subjective intent is required for "true threats" under the First Amendment. (Resp. App. 15a.)

of *Black* on this case. On June 27, 2003, the Court denied certiorari review. (Pet. App. 66.)[13]

E. The Ninth Circuit Mandate

On July 9, 2003, the court of appeals issued its mandate. As noted above, the *en banc* court had found "no reversible error on liability or in the equitable relief that was granted," "affirm[ed] the judgment in all respects but for punitive damages," and remanded solely for "consideration of whether the punitive damages award comports with due process.") (Pet. App. 75, 127.)

F. District Court Proceedings on Remand

On remand, contrary to petitioners' representation in their motion to stay the mandate that "[t]he only issue on remand would be whether the punitive damages award should stand or be lowered" (Resp. App. 26a-27a), and the Ninth Circuit's clear mandate that the proceedings were limited to review of the jury's punitive damages awards (Pet. App. 75), ACLA filed motions raising arguments wholly unrelated to the punitive damages question—all of which either had already been rejected or could have been raised long ago. (*Id.* at 45-46.) The district court properly "decline[d] to address the multitude

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[13] ACLA contends that denial of its first petition does not preclude review now "because the denial of certiorari is not an adjudication on the merits." (Pet. 9 n.4.) But this contention ignores the realities of what occurred before this Court when ACLA filed its prior petition. At that time, the parties and the Solicitor General submitted briefs that addressed the very First Amendment questions that ACLA presents in its current petition, not jurisdictional or "finality" issues (which Physicians had noted only in a passing footnote in their brief). It was only after this Court received the Solicitor General's detailed submission—"which concluded that none of ACLA's challenges . . . merited review" and which made no mention at all of any "finality" concerns—that ACLA's first petition was denied.

of other issues" raised by ACLA, and "specifically den[ied] defendants' demand for a new trial." (*Id.*) Addressing the punitive-damages question properly before it, the district court concluded that the jury's awards were "reasonable and constitutional" under the Due Process Clause. (*Id.* at 46.)

G. ACLA's Second Appeal and Certiorari Petition

ACLA appealed. Again in contravention of the mandate, ACLA—as it did in the district court—raised a multitude of issues before the Ninth Circuit unrelated to punitive damages. ACLA's second appeal was heard by a three-judge panel comprised of Judges Fernandez, Rymer, and Kleinfeld. In an opinion by Judge Rymer, the three-judge panel unanimously held that the appeal was limited to punitive damages, as the *en banc* court had mandated, and remitted the punitive damages awards dramatically. In particular, the court of appeals held that although petitioners' conduct was "on the high side of reprehensibility" and "warrant[ed] the imposition of significant sanctions to punish and deter," the ratio of punitive to compensatory damages awarded by the jury exceeded constitutional limits. (Pet. App. 19-20.) Based on a single-digit ratio of 9:1, the court remitted the awards to a reduced amount totaling $4.7 million and remanded "so that the district court may order a new trial unless [P]hysicians accept the remittitur." (*Id.* at 28-32.) [14] The panel also unanimously affirmed the district court's disposition of the many non-punitive-damages

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[14] The court of appeals expressly rejected Physicians' position, which was adopted by the district court, as to how the applicable ratios should be calculated in this case. Instead, the Ninth Circuit articulated its own approach (not argued by ACLA) in formulating the ratios, which was more favorable to petitioners. (Pet. App. 20-29.) Because the Ninth Circuit has stayed its mandate pending the conclusion of proceedings in this Court, the parties have not appeared before the district court on the question whether Physicians will accept the remittitur.

issues raised by ACLA, holding that "all these issues were finally settled" by the *en banc* court on the first appeal and "are not open for review." (*Id.* at 32-34.)[15]

ACLA's request for rehearing and rehearing *en banc* was denied, with no judge on the Ninth Circuit requesting a vote on whether to rehear the matter. (Pet App. 402-03.) Now, for the second time, petitioners seek review in this Court.

REASONS FOR DENYING THE PETITION

ACLA devotes the majority of its petition to re-raising the very same First Amendment questions that this Court properly declined to review three years ago. Indeed, although the First Amendment questions presented have now been reduced in number (from seven to one) and the arguments have been somewhat reorganized, ACLA's current petition is largely a word-for-word copy of its prior petition. Nothing has changed since 2003, however, to make ACLA's factbound disagreements over the court of appeals' application of settled threats law any more certworthy this second time around. *See* S. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ where question turned on review of factual findings).

Nevertheless, in an effort to suggest that its second petition is somehow different than its first, ACLA contends that a conflict now exists over the appropriate intent standard for true threats and that this warrants certiorari review. ACLA is

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[15] Notably, Judge Kleinfeld—who had dissented from the *en banc* majority on the first appeal and had joined Judge Kozinski's original panel opinion—agreed that non-punitive-damages issues raised by petitioners—including all three proposed questions in the petition—were not open for review. (Pet. App. 32-34.)

incorrect. This Court's decision in *Black*—which was handed down *before* the Court denied certiorari on ACLA's prior petition and whose impact was previously briefed to the Court by both the parties and the U.S. Solicitor General—does not establish a subjective-intent requirement for true threats. And even if it did, it would not matter here. As the *en banc* Ninth Circuit indisputably held, any subjective-intent requirement was satisfied in this case by the jury's finding that each petitioner was liable under the FACE statute. (Pet. App. 100-01, 111.) Thus, as the Solicitor General emphasized in opposing certiorari on ACLA's first petition, this case is "not a suitable vehicle to address . . . whether the definition of a true threat should include a subjective as well as an objective component." (Resp. App. 15a.)

The remaining questions presented by ACLA's petition—a factbound challenge to the size of the remitted punitive damages awards as well as petitioners' unpreserved RICO, standing and FACE conspiracy arguments—also fall far short of the standards required for this Court's review. *See* S. Ct. R. 10. The petition for certiorari, accordingly, should be denied.

I. PETITIONERS' FIRST AMENDMENT ARGUMENTS PRESENT NO LEGAL ISSUE FOR SUPREME COURT REVIEW

A. The Ninth Circuit Properly Applied The Settled Legal Standard For True Threats of Violence—Which Fully Governs "Public Forum Political Speech"

It is well-settled that "true threats" of violence are not protected by the First Amendment. *Black*, 538 U.S. at 359; *Watts*, 394 U.S. at 707; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994). (*See* Pet. App. 75, 90, 93, 126-27, 130, 207.) ACLA does not—and cannot—argue otherwise. Instead, ACLA contends that its statements could not be true

threats because they consisted of "public-forum political speech" and, thus, under *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), required some sort of heightened, "extreme care" standard of review that allegedly was not satisfied in this case. (Pet. 12-13.) This is just wrong. The court of appeals independent review of the facts of this case took into account all contextual factors, as this Court's precedents require, and ACLA's disagreement, once again, concerns the result of that application of settled law to the facts.

Indeed, many threats cases—including those involving threats against the President and other federal officers—involve public, political speech, and no different standard applies. As the *en banc* Ninth Circuit held, and the Solicitor General noted in opposing ACLA's first certiorari petition, the same standard—an objective, reasonable person test, in which "the whole factual context" is considered[16]—controls the threats determination irrespective of the speaker's particular political views or method of communication. (Pet. App. 106-13; Resp. App. 15a-17a); *see, e.g.*, *Madsen*, 512 U.S. at 773 (stating, in a case involving abortion protesters, that "threats . . . however communicated, are proscribable under the First Amendment").

The *en banc* Ninth Circuit carefully considered both the political aspect and the public distribution of petitioners' statements. (Pet. App. 101-103; *see* Resp. App. 24a.) And, upon *de novo* review of the factual record, the *en banc* court determined, as had the jury and district court judge, that a reasonable speaker in ACLA's position would reasonably foresee—indeed, could only believe—that respondents would

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[16] ACLA contends that, after *Black*, the test for true threats requires subjective intent to threaten. (Pet. 14.) As discussed below, ACLA not only misinterprets *Black*, but ignores that, as the Ninth Circuit found and the Solicitor General agreed, any subjective-intent requirement was met in this case. This case, therefore, is not a suitable vehicle for the Court to revisit the recent *Black* decision. *See infra* pp. 15-19.

perceive ACLA's statements as a serious expression of an intent to do them bodily harm. (Pet. App. 89, 119-23, 126-27.) ACLA's factbound disagreement with the finding that their statements constituted unprotected threats of violence is no basis for certiorari review. *See* S. Ct. R. 10.

At bottom, ACLA's argument boils down to a claim that the *en banc* Ninth Circuit's decision in this case conflicts with this Court's 1982 decision in *Claiborne Hardware*. (Pet. 11-24.) But, as the Solicitor General emphasized in opposing ACLA's prior petition, this is simply not so. (Resp. App. 23a ("Nor are petitioners correct in claiming that that the court of appeals' decision conflicts with *Claiborne Hardware*.").) The *en banc* court, in fact, fully and carefully analyzed the facts of *Claiborne Hardware* against the very different facts of this case, and ACLA's disagreement with the result of that analysis presents no question for certiorari review. (Pet. App. 94-97.)

Claiborne Hardware did not even involve a true threats analysis under a threats statute. As the *en banc* Ninth Circuit explained, although some of the statements by Charles Evers at issue in *Claiborne Hardware* (including "the break your neck" comments referred to in the petition) could have been understood as threats in some other contexts, "there was no context [under the facts of *Claiborne Hardware*] to give" the statements "the implication of authorizing or directly threatening unlawful conduct." (Pet. App. 97.) The *en banc* court further noted that—unlike this case—Evers's statements were "extemporaneous, surrounded by statements supporting non-violent action," did not target specific individuals, and were not similar to statements that preceded violence in the past. (*Id.*) "Nor is there any indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." (*Id.*)

As the Solicitor General stated, "[a]ll of those considerations distinguish *Claiborne Hardware* from this case." (Resp. App. 24a.) Indeed, unlike the targets of Evers's speech — the boycott-breakers who were *not* the plaintiffs in *Claiborne Hardware*—Physicians testified about their personal fear following ACLA's threats (and fear of ACLA in particular) and described the extensive security measures they undertook as a direct result. (Pet. App. 60, 78-81, 294.) The prior posters and murders and petitioners' repeated endorsement of that violence provided further context for the finding of intent to threaten violence that the *Claiborne Hardware* facts lacked. (*Id.* at 94-97, 119-123.) There simply is no conflict here with the law enunciated in *Claiborne Hardware*—the facts and legal bases of the decisions are just different.

Finally, it should be noted that, in *Black*, this Court held that cross-burning—which indisputably is "public" and "political" in nature—was a "true threat" unprotected by the First Amendment. And, in so holding, the *Black* Court—directly contrary to ACLA's argument here—applied no heightened, "extreme care" threats standard and did not cite *Claiborne Hardware*. 538 U.S. at 363. Petitioners' *Claiborne Hardware* argument provides no basis for review.

B. Petitioners' Proposed Subjective Intent Requirement for "True Threats" Presents No Issue For Review Because Subjective Intent Was Found In This Case

ACLA once again asks this Court to grant review in order to change First Amendment law in all cases to require subjective intent for "true threats"—a standard that was, in any event, met in this case.[17] ACLA bases this renewed request on

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[17] ACLA's petition makes clear that its proposed subjective intent requirement would derive not from any statute but rather from the First Amendment. (Pet. 14-15.) Thus, adoption of a subjective intent

a misreading of this Court's decision in *Black* and a misunderstanding of its impact here.[18]

In *Black*, this Court held that Virginia's ban on cross burning with an intent to intimidate did not violate the First Amendment. 538 U.S. at 347-48. The *Black* Court reaffirmed that "true threats" are unprotected by the Constitution and explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." As it did in a supplemental brief filed on the prior petition, ACLA now points to this language as somehow imposing a subjective-intent requirement for threats as a matter of First Amendment law. (Pet. 14-15.) As the Solicitor General noted in opposing ACLA's first petition, however, the *Black* Court "was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both)." (Resp. App. 21a n.6.)

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standard in this case would make subjective intent the constitutional intent requirement for all threats statutes, including those that proscribe threats against the President and contained in anti-terrorism laws. *See supra* note 16. Defendants in all of these contexts would contend that they are engaging in protected political speech.

[18] ACLA's argument that the Court should adopt a subjective intent requirement for true threats also was not properly preserved below. Petitioners supposedly "preserved for appeal" a specific intent argument by including a specific intent jury charge in a mass of proposed jury instructions that contained contradictory instructions on the standard of intent. But, petitioners *never* argued that the trial court should give the instruction. Instead, at the final charge conference, ACLA's lead counsel stated with respect to the "true threats" instruction: "Yes, I never said—I never said the test should be changed. . . . I am not arguing, your Honor, that the test should be changed." (1/25/99 Tr. 3123.) Simply submitting a proposed instruction stating it is "preserved for appeal" is insufficient under well-settled rules of preservation. Fed. R. Civ. P. 51; *see, e.g.*, *Monroe* v. *City of Phoenix*, 248 F.3d 851, 858-59 (9th Cir. 2001).

And, even more significantly—as the *en banc* Ninth Circuit majority made abundantly clear and ACLA ignores—the jury in this case found specific intent and for this reason, as the Solicitor General stated, "[t]his case is not a suitable vehicle to address . . . whether . . . the definition of a true threat should include a subjective as well as an objective component." (Pet. App. 101; Resp. App. 15a.) As Judge Rymer's opinion for the *en banc* court explains, the jury instructions for the statutory elements of FACE—which ACLA ignores entirely—required a finding of intent to intimidate (with intimidation specifically defined to mean by threats of bodily injury) and thus satisfied any subjective intent standard. (Pet. App. 101 (noting that a subjective intent standard "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate").)[19] Thus, this Court should not review ACLA's subjective-intent question because it would have no impact on this case. (Resp. App. 15a ("The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.").)[20]

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[19] ACLA contends that the "intent to intimidate" found by the jury may have been only a "generalized" intent to intimidate and not a "specific intent to *threaten* violence to be *committed by the speaker*," which it claims is required by *Black*. (Pet. 16.) This is not so, as intimidation is explicitly defined in FACE (and in the jury instructions) to be limited to threats of *bodily* harm. 18 U.S.C. § 248; (*see also* Resp. App. 22a ("An intent to intimidate—defined by the district court as "to place a person in reasonable apprehension of bodily harm—is virtually identical to an intent to threaten.").)

[20] Nor is ACLA's argument that the Ninth Circuit erred in not considering the impact of *Black* (or *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), *see infra* pp. 24-27) of any merit. As the

Indeed, although ACLA asserts that a circuit conflict now exists on the subjective-intent question after *Black*, the very case that it relies on in an attempt to prove this conflict—the Ninth Circuit's decision in *United States* v. *Cassel*, 408 F.3d 622 (9th Cir. 2005)—not only would present a nonreviewable intra-circuit conflict but actually undermines any argument for certiorari review by expressly recognizing that the adoption of a subjective-intent requirement would not affect the outcome *of this case*. As the *Cassel* court stated, because "in *Planned Parenthood* . . . the statute in question contained an *explicit* requirement of intent to threaten (or 'intent to intimidate')," any subjective-intent requirement was satisfied by the jury's finding that each defendant was liable under FACE. *Id.* at 630 (emphasis added); *see also United States* v. *Stewart*, 420 F.3d 1007, 1017 (9th Cir. 2005) (post-*Cassel*; holding that any subjective-intent standard for true threats was met by the intent

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Ninth Circuit explained, under the rule of mandate, the only issue open on the second appeal after remand was the jury's awards of punitive damages—and thus the only supervening Supreme Court decision of any relevance was *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), which was fully considered by the courts below. (Pet. App. 32-34.) The cases cited by ACLA are inapposite. (Pet. 15-17.) Both *United States* v. *Wells*, 519 U.S. 482, 488 n.4 (1997), and *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), address the law of the case doctrine, not the rule of mandate. (ACLA's claim that *Wells* deals with the rule of mandate is just wrong and appears to be a (rather clumsy) attempt to mislead the Court. Even a cursory review of the *Wells* decision—indeed of the very footnote cited by ACLA—demonstrates this. *Wells*, 519 U.S. at 487 & n.4.) And, ACLA's claim that *Arthur Andersen LLP* v. *United States*, 125 S.Ct. 2129 (2005), somehow "compels a new trial" here is wholly misguided. (Pet. 18.) In *Arthur Andersen*, this Court considered the "elements of a 'corrup[t] persuas[ion]' conviction" under 18 U.S.C. § 1512(b). *Id.* at 2132. Plainly, this interpretation of a federal obstruction of justice statute has no bearing on the intent standard for "true threats" under the First Amendment. *See id.* at 2135 n.9 (noting that this interpretation of § 1512(b) does not even control the intent element for other federal obstruction statutes).

element of the statute in question there, which punishes only certain categories of threats made with the intent to "impede, intimidate, interfere with, or retaliate").[21] This Court's review of what, in any event, would be an intra-circuit conflict is, therefore, plainly unwarranted. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (dismissing writ as improvidently granted where "the record does not fairly present the question").[22]

C. ACLA Was Not Held Liable For "Generating Fear" of Third-Party Violence—It Was Held Liable For Its Own True Threats of Violence

ACLA also contends—as it did without success on its first petition—that the *en banc* Ninth Circuit's decision conflicts with *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), by allegedly finding petitioners liable for "'generating fear' of third-party violence, rather than direct threats of violence." (Pet. 19-24.) This is clearly not so and provides no basis for certiorari review.

This is not an incitement case. ACLA was held liable not for inciting acts by others or for "'generat[ing] fear' of third-party violence that never followed," but for its own threats of

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[21] Intra-circuit conflict is *not* a basis for Supreme Court review. S. Ct. R. 10; *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[22] Although ACLA's petition does not seek review of the scope of the injunction, in a footnote ACLA suggests that the injunction's specific intent requirement for restrained future conduct somehow supports petitioners' position. (Pet. 15 n.7.) This makes no sense. As the *en banc* majority held, the terms of the injunction are "finely tuned and exceedingly narrow" in order to "leave[] huge room for ACLA to express its views." (Pet. App. 126.) The district court's abundance of caution in crafting the injunction clearly satisfies this Court's precedents reconciling important protections afforded by injunctions with the expressive rights of the enjoined party. (*Id.* at 125-126); *see Madsen*, 512 U.S. at 765.

violence. *Brandenburg*—which governs incitement—thus has no relevance here. As the Solicitor General emphasized: "*Brandenburg* was not . . . a threats case. This Court has never suggested that true threats should be subject to *Brandenburg*'s imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression." (Resp. App. 23a (citing *Black*, 538 U.S. at 359).) Indeed, recognizing this very distinction, ACLA urged the district court to instruct the jury on the difference between threats and incitement—and received the precise instruction it requested. (Resp. App. 29a-30a; Pet. App. 165-66.)

ACLA's contention that its statements incited no violence (Pet. 21-22) is thus wholly beside the point. "True threats" are proscribable if—as here—they are directed at specific targets whom the speaker should foresee would take the statements as a serious expression of an intent to do bodily harm. (Pet. App. 126.) That violence was not "incited" (even if true) is irrelevant to a threats analysis. True threats are proscribed to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992); *accord Black*, 359 U.S. at 360. Indeed, if a threatener's words provoke enough fear, physical violence—by anyone—to carry out the threat is unnecessary, as the threatener's terrorist purpose is accomplished. *See, e.g.*, *United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985).[23]

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[23] Nor does this case present any common issue—much less a conflict—with *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). There, this Court struck down a statute that prohibited simulated child pornography, holding that the connection between the speech at issue and the harm it may cause was too "contingent and indirect" to justify suppression. 535 U.S. at 1401-03. That is not what this case is about.

Further, to the extent ACLA is arguing what Judge Kozinski argued in his *en banc* dissent (as well as in his original three-judge panel opinion)—*i.e.*, that the evidence does not establish that petitioners' posters and list conveyed the message that petitioners themselves would inflict bodily harm on Physicians (Pet. App. 129)—that argument also provides no basis for this Court's review. As noted above, Judge Kozinski's dissent took issue not with the *en banc* majority's articulation of the applicable legal standard, but with its application of that standard to the facts of this case. (*Id.* at 128-30.) Indeed, upon independent review of the factual record, the *en banc* majority, like the jury, found that Judge Kozinski's proposed standard was met—and that the evidence demonstrated that petitioners, not third parties, would be the source of the threatened harm on Physicians. (*E.g.*, *id.* at 75 ("the jury must have found that ACLA made statements to intimidate the [P]hysicians, reasonably foreseeing that [P]hysicians would interpret the statements as a serious expression of *ACLA's* intent to harm them" (emphasis added).)[24] The dissenting Ninth Circuit judges—and ACLA, to the degree it now makes this same

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ACLA's posters were found to be true threats to kill because ACLA knew that the posters would be perceived as a serious expression of an intent to do bodily harm to Physicians. (Pet. App. 119-23.) Threats simply were not at issue in *Free Speech Coalition*.

[24] The evidence was substantial on this issue. ACLA issued its posters with knowledge of the preceding posters and murders, and Physicians "could well believe that *ACLA* would make good on the threat." (Pet. App. 120-22 (emphasis added).) The verdict form showed the jury's finding that each of the three statements "is a true threat ***by one or more of the defendants to bodily harm, assault or kill*** one or more of the plaintiffs." (*Id.* at 429.) Physicians also testified that they feared *these* defendants. Dr. Hern, for example, testified that ACLA's hit lists said "do what we tell you to do, or *we will kill you.* And they do." "This is a hit list and that *these people who made this list will kill me.*" "I am fearful for my life, that I am afraid that—*that someone from the group that put out this poster* would be there and would kill me." (Tr. 639, 664; Pet. App. 80 (emphases added).)

argument—simply take a different view as to what the evidence in this case shows. (*Id.* at 129.) Like every other question presented by ACLA's petition, this sort of factbound disagreement over the evidence does not warrant certiorari review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review.").[25]

II. PETITIONERS' FACTBOUND CHALLENGE TO THE REMITTED PUNITIVE DAMAGES AWARDS DOES NOT MERIT REVIEW

Since the time of ACLA's first unsuccessful certiorari petition, the Ninth Circuit, applying this Court's precedents, including *State Farm*, has drastically reduced the punitive damages awards in this case from $108.5 million to $4.7 million. (Pet. App. 2, 30-31.) ACLA contends that even this amount is too much—that, under *State Farm*, "punitive damages may not be assessed absent truly reprehensible conduct and adequate notice that such a penalty was in the offing" and that, therefore, "[a]t a minimum," the entire award should be stricken. (Pet. 24-26.) As the petition makes plain, however, ACLA's real complaint is not with the legal standard applied by

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[25] In a footnote, ACLA makes the undeveloped argument that the court of appeals "departed from this Court's requirement of *de novo* review of the record in First Amendment cases." (Pet. 24 n.13.) This is just wrong. As is clear from its opinion, the *en banc* majority "review[ed] the evidence on true threats independently" (Pet. App. 120), adhering to the standard of appellate review on First Amendment issues set out in this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Even the dissenting Ninth Circuit judges agreed that the majority articulated the appropriate standard of independent review. (Pet. App. 129; *see also id.* at 175 n.15.) As did the Solicitor General. (Resp. App. 25a.)

the Ninth Circuit, but with a result other than no damages. This is not a basis for this Court's review. *See* S. Ct. R. 10.[26]

The court of appeals articulated this Court's three-prong test for evaluating the constitutionality of punitive damages awards under the Due Process Clause—which ACLA does not (and cannot) challenge. (Pet. App. 7; Pet. 24-26.) The court then found ACLA's conduct to be "particularly reprehensible" and thus expressly rejected the argument that no punitive damages should be awarded in this case. (Pet. App. 15-26, 27 (noting that "ACLA made no bones about its intent to intimidate those in the reproductive health services community by true threats of serious injury or death").) The Ninth Circuit held that, under this Court's case law (which, again, ACLA does not challenge), a 9 to 1 ratio of punitive to compensatory damages was the appropriate balance in this case—thus dramatically remitting the awards, *in petitioners' favor*, by $103.8 million. (*Id.* at 28-29.) ACLA's wish that the award had been reduced even more is no basis for certiorari review.[27]

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[26] ACLA has failed to include a punitive-damages argument in the Questions Presented in the petition. This alone is enough to defeat certiorari review. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 202-03 (2002) (holding that a question not presented in the petition was "not properly before" the Court).

[27] Indeed, if anything, the punitive damages awards should be higher. The court of appeals gave *no* consideration to the potential and noneconomic harms suffered by Physicians, and it expressly rejected Physicians' position, which had been the view adopted by the district court, as to how properly to formulate the applicable ratios in this multi-defendant case. (Pet. App. 15-29.) After the Ninth Circuit's decision, some respondents are left with very little in the way of monetary damages. (*E.g. id.* at 31 (reducing the punitive damages awarded to respondent Dr. James Newhall from $14 million to $3,375).) This result clearly does not provide grounds for petitioners' request for review by this Court.

III. PETITIONERS' OTHER ARGUMENTS PRESENT NO PRESERVED LEGAL ISSUE FOR SUPREME COURT REVIEW

A. Petitioners Have Failed To Preserve Their RICO Arguments

ACLA contends that the Ninth Circuit—on the second appeal following remand—erred in not reconsidering the RICO liability judgment, which had been affirmed in its entirety, in light of this Court's decision in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), which was decided between ACLA's first and second appeals to the Ninth Circuit.[28] ACLA failed properly to preserve this argument, however, and it therefore is barred by waiver principles, the mandate rule, and the law of the case doctrine. (Pet. App. 31-34); *see In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (mandate rule); *Kesselring* v. *F/T Arctic Hero*, 95 F.3d 23, 24-25 (9th Cir. 1996) (issues not raised on first appeal are waived); *United States* v. *Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) ("A legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time" (quoting *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)) (internal quotation marks omitted).). Indeed, this very argument was made on ACLA's first petition by one of petitioners' *amici*. This Court properly declined review then; it should do the same now.

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[28] The limited remand as to punitive damages concerned only the FACE judgment, as punitive damages are not available—and were not sought— under RICO. (Pet. App. 34, 75.)

Although petitioners raised several RICO and Hobbs-Act arguments in their motions for summary judgment, at trial, in Rule 50 motions at the close of all evidence, *and on their first Ninth Circuit appeal*, petitioners—despite their knowledge of the ongoing proceedings in *Scheidler*—*never* raised the argument that they had not "obtained" Physicians' property for purposes of Hobbs-Act extortion after the district court rejected this argument at the motion-to-dismiss stage. (*See* Pet. App. 381-83.) The jury in this case was instructed on the RICO claim without any argument by petitioners as to the "obtaining" element of the Hobbs Act. (*See* Resp. App. 73a, 81a.) It was not until the punitive-damages remand in 2003—*seven years* after the district court's decision on the motion to dismiss and *ten years* after this Court first noted this Hobbs-Act "obtaining" argument at oral argument in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"), *see* Transcript of Oral Argument, 1993 WL 757635, at *13-16, 21-24, 27-28, 36 (Dec. 8, 1993), that petitioners sought yet another bite at the apple. When ACLA sought to raise this Hobbs-Act argument on its *second* appeal to the Ninth Circuit, the panel properly held that any challenge to the final RICO liability judgment was precluded. (Pet. App. 32-34.)

ACLA's apparent suggestion that it could not waive the "obtaining" argument because *Scheidler II* was not handed down until after the trial and first appeal in this case is meritless.[29] As the Court stated in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950):

> Petitioner cannot be relieved of [his] choice [not to appeal from a court holding on a specific issue] because hindsight seems to indicate to him that [this] decision . . . was probably wrong,

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[29] Like *Black*, *Scheidler II* was decided *before* this Court denied ACLA's first certiorari petition.

> considering the outcome of the [intervening] *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

See also Hylton, 294 F.3d at 135; *Clifton* v. *Attorney Gen. of Cal.*, 997 F.2d 660, 664 n.5 (9th Cir. 1993) (noting that even if a supervening Supreme Court decision has authoritatively changed the law on a specific issue, relief should not be permitted where, as here, "a party has made a deliberate choice not to pursue an appeal" from a determination of the trial court on that issue); *Title* v. *United States*, 263 F.2d 28, 31 (9th Cir. 1959) (same).

At least as early as 1993 (when the Hobbs Act "obtaining" argument was a subject of this Court's oral argument in *Scheidler I*, *see* Transcript of Oral Argument, 1993 WL 757635, at **13-16, 21-24, 27-28, 36) or 1995 (when, on remand, the district court in *Scheidler* expressly addressed the "obtaining" argument in a published opinion, *National Organization for Women, Inc.* v. *Scheidler*, 897 F.Supp. 1047, 1075 n.20 (N.D. Ill. 1995)) ACLA was clearly on notice of the "obtaining" argument. ACLA's failure to raise the argument at trial or on its first appeal is without justification or excuse. That appeal concluded with a final decision on the RICO claims in this case, with a remand solely as to punitive damages under FACE. Following that limited remand, the Ninth Circuit properly denied ACLA's request to re-open the RICO judgment.[30]

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[30] In a few passing sentences, ACLA also asserts that Physicians' RICO claims fail for lack of "standing" because Physicians have not proven "an injury to 'business or property' as required for standing under RICO." (Pet. 27.) This undeveloped argument, too, is meritless—the jury specifically found such injury to property under RICO and the Hobbs Act (Pet. App. 430-444)—and such a factbound disagreement with the jury's findings provides no basis for this Court's review. In

Indeed, this case demonstrates precisely why the preservation doctrine exists. Unlike the defendants in *Scheidler*, ACLA failed to raise this "obtaining" argument at trial when Physicians could have pursued other RICO predicate acts had ACLA challenged the RICO claims. Such other predicate acts are not precluded by *Scheidler II*'s ruling as to the meaning of extortion under the Hobbs Act. (Pet. App. 381-385.)[31]

B. Petitioners Have Failed To Preserve Their Standing Argument

ACLA argues that the respondent health clinics (Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center) lacked standing to sue and that the Court should therefore remand to the Ninth Circuit with instructions to dismiss the clinics' claims and vacate the damages awards in their favor. (Pet. 28-29.) But the district court rejected this precise standing argument as a matter of law on summary judgment, and the jury rejected the argument *on the facts* at trial when it awarded the clinics distinct damages pursuant to instructions that are not challenged here. (Pet. App. 330-331, 430-444.) ACLA admits that it did not raise the argument on its first Ninth Circuit appeal. (Pet. 28.) It plainly is barred. (Pet. App. 28-29.) Moreover, like the Hobbs-Act argument just discussed, this standing argument was raised by one of ACLA's *amici* on the first petition, and this Court correctly did not grant review. *See supra* note 3.

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addition, this argument was raised by one of ACLA's *amici* on the first petition, and this Court properly declined review. *See supra* note 3.

[31] It should be noted that a new trial on the RICO claims alone, rather than dismissal, is the very most ACLA could attain (and, of course, it *cannot* attain even this, for the reasons noted above). It would be unfair to give ACLA the right to reargue waived points without providing Physicians the concomitant benefit of how they would have proceeded against ACLA in light of the ruling in *Scheidler II*.

ACLA erroneously contends that its standing argument somehow is a nonwaivable issue of subject-matter jurisdiction that should be considered now. (Pet. 28.) But, as the district court made clear, the standing argument presented by ACLA requires an analysis into the respondent clinics' underlying factual claims of liability under FACE and RICO—which makes ACLA's argument one of statutory, not constitutional, standing. (Pet. App. 330-31); *see also Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113, 129 (2d Cir. 2003) ("[i]n evaluating whether a plaintiff has standing under RICO, the court must . . . 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them'" and that because such an examination is "sufficiently intertwined with the merits of the RICO claim," "RICO standing is not a jurisdictional issue" (quoting *Associated Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983))). In any event, even if ACLA's standing argument implicated Article III (and it does not), it would still be precluded now. (Pet. App. 32-34); *see also Ferreira* v. *Borja*, 93 F.3d 671, 674 (9th Cir. 1996) (law of the case applies to jurisdictional rulings).

At bottom, ACLA's only disagreement here is with the jury's application of the evidence in this case to the statutory standards of FACE and RICO under which the jury was instructed. (*See* Pet. App. 420 ("To find for a particular plaintiff on the FACE claim, you must find . . . that the plaintiff was aggrieved or harmed by that threat."); Resp. App. 30a-33a (instructing jury that it must find that defendant's violation specifically caused the plaintiff's injury to award that plaintiff any damages under FACE or RICO); *see also* Pet. App. 330-31 (rejecting defendants' standing arguments when "at trial each plaintiff will be required to prove that a reasonable person in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made" and "each plaintiff must prove pecuniary loss"). Based upon its view of the evidence at trial, the jury found that petitioners caused each clinic respondent distinct damages as a

result of the threats at issue. (Resp. App. 30a-33a; Pet. App. 429-44.) ACLA's continuing factbound dispute with the jury's verdict is not a basis for certiorari review. S. Ct. R. 10.

C. Petitioners Have Failed To Preserve Their FACE Conspiracy Argument

Finally—just as it did unsuccessfully on its first petition—ACLA argues that this Court should order a new trial on Physicians' FACE claim because the jury was allowed to consider a "non-existent" claim for conspiracy to violate FACE. (Pet. 29-30.) But, not only did ACLA fail *ever* to raise this argument in the district court, ACLA's own proposed jury instructions and jury verdict form actually included a FACE conspiracy claim. (Resp. App. 37a-67a, 71a-72a, 78a-80a.) Thus, the *en banc* Ninth Circuit properly rejected the argument on preservation grounds. (Pet. App. 112 n.16 ("declin[ing] to consider the issue because it is raised for the first time on appeal" and noting that "[ACLA] had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy)").)

Petitioners' assertion that they are raising a nonwaivable matter of subject-matter jurisdiction is nonsense. The question whether civil conspiracy claims are permissible under FACE is one that goes to whether Physicians have stated a claim—it does not involve the Court's subject matter jurisdiction. *See, e.g.*, *Arbaugh* v. *Y & H Corp.*, 126 S. Ct. 1235, 1244 n.10 (2006) (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

In sum, ACLA's argument concerning Physicians' FACE conspiracy claim has not been properly preserved or

developed and, accordingly, is not a basis on which this Court should grant review.[32]

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 27, 2006

Respectfully submitted,

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[32] As the *en banc* Ninth Circuit noted, "FACE came into being in part because of 'organized,' 'concerted' campaigns by 'groups' to disrupt access to reproductive health services . . . ." (Pet. App. 112 n.16 (quoting S. Rep. No. 103-117, at 6-7).) Thus, despite ACLA's argument that plain error has taken place here, the Ninth Circuit correctly found to the contrary. (*Id.* at 112 n.16.)

Gore, 517 U.S. at 582-83, 116 S.Ct. 1589 (bracketed material in original; citations omitted).

In *State Farm*, the Supreme Court further elaborated on the ratio guidepost, stating:

> We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. * * * We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. * * *
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." * * * [A] higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. * * * The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm, 123 S.Ct. at 1524 (internal citations omitted).

Accordingly, the relevant inquiry is whether, in view of each defendant's conduct toward these plaintiffs, the punitive damages awards are reasonable and proportionate to the amount of harm each defendant caused. Before addressing that issue, however, I must decide two preliminary issues. The first is whether each plaintiff is entitled to 14 separate judgments for the same compensatory damages, or the compensatory awards are joint and several as to all defendants. Second, I must decide which proposed comparison of compensatory damages to punitive damages, defendants' or plaintiffs', yields the appropriate ratio for purposes of my review.

With respect to the first issue, it should be beyond cavil that the compensatory awards in this case against these joint tortfeasors and co-conspirators are joint and several,[5] and I so find. *See, e.g., U.S. v. Gregg*, 226 F.3d 253, 257-60 (3rd Cir.2000) ("Congress intended FACE's compensatory statutory damages be awarded per violation and jointly and severally among defendants"). In calculating the compensatory damages awards in this case, the jury appears to have carefully considered each plaintiff's damages, then awarded that same amount against each individual defendant. The verdicts thus leave no room for a credible debate that the compensatory damages awards were anything but joint and several, and plaintiffs do not now contend and never have contended that they are entitled to recover multiple separate compensatory damage judgments.

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[5] Liability is joint and several when "'the creditor may sue one or more of the parties to such liability separately, or all of them together, at his [or her] option.'" *U.S. v. Gregg*, 226 F.3d 253, 260 (3rd Cir.2000) (citation omitted).

This brings me to the second issue, what is the appropriate comparison for purposes of determining ratios. Defendants assert that the only fair calculation is to compare the compensatory damages recoverable by each plaintiff with the total punitive damages awarded each plaintiff against all defendants. *See* Defendants' Reply Memorandum, p. 17. That comparison yields ratios of compensatory damages to punitive damages, by plaintiff, as follows: Crist (366:1); Hern (901:1); E. Newhall (886:1); J. Newhall (37,333:1); Planned Parenthood (73:1); and Portland Feminist (467:1). *See* Defendants' Reply Memorandum, p. 17.

Plaintiffs, in turn, propose an approach that compares the total joint and several liability of each defendant ($526,336.14) to the total punitive damages awarded against that defendant. That comparison yields ratios of compensatory damages to punitive damages, by defendant, as follows: ACLA (31.8:1); ALM (31.8:1); Bray (15.2:1); Burnett (15.2:1); Crane (15.2:1); Dodds (9.5:1); Dreste (9.5:1); Foreman (9.5:1); McMillan (15.2:1); Murch (9.5:1); Ramey (6.65:1); Stover (6.65:1); Treshman (15.2:1); and Wysong (15.2:1). *See* Plaintiffs' Memorandum in Response, p. 8.

A third possible approach, not proposed by either side, would be to compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant. This approach yields extreme variations in ratio, depending on the amount of the compensatory award. Thus, the ratios with respect to plaintiff Crist, calculated in this manner, range from a high of 56.7:1 (ACLA and ALM) to a low of 12.6:1 (Ramey and Stover); for plaintiff Hern, a high of 103.9:1 (ACLA and ALM) to a low of 34.65:1 (Ramey and Stover); for plaintiff E. Newhall, a high of 126.6:1 (ACLA and ALM) to a low of 31.6:1

(Ramey and Stover); for J. Newhall, a high of 5333:1 (ACLA and ALM) to a low of 1333.3:1 (Ramey and Stover); for Planned Parenthood, a high of 14.78:1 (ACLA and ALM) to a low of 1.85:1 (Ramey and Stover); and for Portland Feminist, a high of 59.7:1 (ACLA and ALM) to a low of 14.9:1 (Ramey and Stover).

I have carefully considered all three options, and conclude that the fairest and most appropriate comparison is that proposed by plaintiffs, which compares the aggregate compensatory damages award against each defendant with the aggregate award of punitive damages against *that defendant*. This approach thus compares the joint and several liability of each defendant for compensatory damages with the defendant's individual liability for punitive damages, which comports with due process and is the proper approach. *See Bell v. Clackamas County*, 341 F.3d 858, 867-68 (9th Cir.2003) (on remand, "trial court should evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*"); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir.1985) (relevant ratio calculated by comparing total compensatory damages for which each defendant was jointly and severally liable with the punitive damages awards against each individual defendant).

Thus, the relevant ratios[6] under my consideration are as follows:

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[6] The numbers have been rounded as appropriate.

Defendant	*Ratio*
ACLA	31.8:1
ALM	31.8:1
Bray	15.2:1
Burnett	15.2:1
Crane	15.2:1
Dodds	9.5:1
Dreste	9.5:1
Foreman	9.5:1
McMillan	15.2:1
Murch	9.5:1
Ramey	6.7:1
Stover	6.7:1
Treshman	15.2:1
Wysong	15.2:1

These ratios "can be contemplated while maintaining normal respiration," *Lee v. Edwards*, 101 F.3d 805, 811 (2nd Cir.1996), and are not unconstitutionally excessive. This is particularly true in view of defendants' egregious, unrelenting, and unapologetic conduct. Moreover, the above ratios compare only the damages plaintiffs were able to prove at trial, and do not incorporate any potential ongoing or future economic or noneconomic harm to them. *See* the portions of the Amended Order and Permanent Injunction set forth *supra*, in which I acknowledge plaintiffs' ongoing harm.

This case presents the type of situation the Supreme Court anticipated in *Gore* and *State Farm*, where a higher

ratio can comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages," or "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; *State Farm*, 123 S.Ct. at 1524. Thus, in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir.2003), the Seventh Circuit approved a compensatory to punitive damage ratio of 37.2:1 where defendant motel deliberately exposed its customers to a substantial risk of being bitten by bedbugs: "The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." 347 F.3d at 677. And in *Swinton*, *supra*, a race discrimination in employment case, the Ninth Circuit approved a compensatory to punitive damage ratio of 28:1 in view of "particularly egregious" acts and "noneconomic harm that might have been difficult to determine." *Swinton*, 270 F.3d at 818 (citation and internal quote marks omitted).

The present case was rife with evidence that plaintiffs suffered harm from the conduct of these defendants, harm that likely was difficult for the jury to quantify. Defendants forced the plaintiffs, out of fear, to restructure their lives and those of their children, to undertake various security measures, to change their habits and routines, and to view the world around them with suspicion. Much more than the bedbug bites in *Mathias*, even more than racial slurs and harassment in *Swinton*, the personal harm to these plaintiffs caused by defendants' threats of violence might be difficult to quantify but justifies a higher ratio in the award of punitive damages.

In summary, I cannot say that the ratios in this case are constitutionally excessive or "jar[] [my] 'constitutional sensibilities.'" *Swinton*, 270 F.3d at 819 (*quoting Haslip*, *supra*, 499 U.S. at 18, 111 S.Ct. 1032). I therefore find the punitive damages awards, with respect to this guidepost, to be reasonable and in proportion to the amount of harm each defendant caused.

C. *Comparable Penalties*

The third indicium of "excessiveness" involves a comparison between the punitive damages awards and the civil penalties that could be imposed for comparable conduct. *State Farm*, 123 S.Ct. at 1526 (noting that the existence of a criminal penalty bears on the seriousness of the conduct, but has limited utility in determining the amount of the punitive award). In this regard, FACE provides both criminal penalties[7] and civil remedies for each violation.

In action commenced by the United States Attorney General or state attorneys general, the available civil remedies include injunctive relief, compensatory damages to the persons aggrieved, and civil penalties. As relevant,[8] the civil penalty for a first offense is $15,000, and $25,000

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[7] The criminal penalties can include prison time and criminal fines. Offenses involving exclusively nonviolent physical obstruction carry fines of not more than $10,000 and six months imprisonment for the first offense, and fines of not more than $25,000 and 18 months imprisonment for each subsequent offense. Offenses involving bodily injury can bring prison terms of 10 years, and offenses involving death can result in any term of years up to life. *See* 18 U.S.C. § 248(b).

[8] Defendants' threats do not qualify as "non-violent physical obstruction[s]," which carry lesser penalties. *See* 18 U.S.C. § 248(c)(2)(B)(i) and (ii).

for each subsequent violation. 18 U.S.C. §§ 248(c)(2)(B) and (c)(3)(B). Notably, in an action commenced by the person or persons aggrieved, FACE places no limit on the amount of compensatory or punitive damages that may be recovered, but does provide for statutory damages *in lieu of* actual damages in the amount of $5,000 per violation. 18 U.S.C. § 248(c)(1)(B).

In this case, defendants engaged in repeated violations of FACE by republishing the same threats over several years' time, from 1995 through at least early 1999. Defendants unveiled the Deadly Dozen poster in Washington, D.C. in January 1995 and the Crist poster in August 1995, and revealed the so-called "Nuremberg Files," in hard copy form, at a January 1996 ACLA event in Washington, D.C. *See Planned Parenthood*, 41 F.Supp.2d at 1131-34. Plaintiffs commenced this action in October 1995; despite plaintiffs' allegations that defendants' actions involved true threats of violence, they continued to publish and republish the posters and the Nuremberg Files until this court issued the Order and Permanent Injunction on February 25, 1999. *See Planned Parenthood*, 1999 WL 65450 (D.Or.1999).

Defendants' suggestion that until the Ninth Circuit issued its *en banc* decision in May 2002, they had "no" notice that their conduct crossed the First Amendment line is, at best, untenable. As the Ninth Circuit recounted in the *en banc* decision,

> By January 1995, ACLA knew the effect that "WANTED," "unWANTED," OR "GUILTY" posters had on doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for [Dr.] Britton, ALM remarked of the

> [Dr.] Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." * * * Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared most were being sued for malpractice and *having their picture put on a poster.*" And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, *if I was an abortionist, I would be afraid.*"

Planned Parenthood, 290 F.3d at 1065-66 (emphasis added).

While the comparable civil penalties in FACE provide some guidance in this court's determination of the reasonableness of the punitive damages awards, they are a starting point, not an upper limit. *See State Farm*, 123 S.Ct. at 1526 (suggesting that a reasonable punitive damage award would be "at or near the amount of compensatory damages," a figure 100 times the comparable civil penalty of $10,000); *see also Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir.2003) (upholding $2.6 million punitive award where damages subject to statutory cap of $300,000).

Turning to the punitive damages awards in this case, and considering the awards individually by defendant and

not in the aggregate, as defendants would desire, I cannot say that the awards are excessive when compared to the civil penalties available per FACE violation. As plaintiffs aptly describe it, the evidence at trial left no doubt that through use of the posters and Nuremberg Files, defendants embarked on a "reign of terror" intentionally designed to make the plaintiffs fear for their lives. Defendants continued their unlawful threats throughout the proceedings in this court and did so without apology, even after the verdict was announced. *See* Plaintiffs' Memorandum of Law in Further Support, p. 3 n. 2. Each of defendants' multiple publications qualify as "subsequent violation[s]" of FACE; presumably, any civil penalties imposed under FACE consequently would be substantial.

In summary, I cannot say that the jury's awards of punitive damages were grossly disproportionate or excessive. I therefore conclude that the awards comport with the due process requirements of the Fourteenth Amendment and are proper.[9]

CONCLUSION

Defendants' Motions on Remand (# 790) are DENIED. Plaintiffs' Motion to Strike (# 793) and defendants' Motion to Preclude Further Briefing (# 808) are DENIED as

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[9] I acknowledge Judge Kozinski's concern that as a result of the liability verdict and punitive damages awards, defendants "will be destroyed financially by a huge debt * * * [that] will * * * prevent them from ever again becoming financially self-sufficient." *Planned Parenthood*, 290 F.3d at 1101 (Kozinski, J., dissenting). As a practical matter, however, these defendants either have no assets or long ago rendered themselves judgment proof; thus, my review of the punitive damages awards largely is academic. Indeed, despite tremendous post-judgment collection efforts, plaintiffs' recovery to date has been *de minimus*.

MOOT. The jury awards of punitive damages are affirmed in full.

IT IS SO ORDERED.

539 U.S. 958, 123 S.Ct. 2637

Supreme Court of the United States AMERICAN COALITION OF LIFE ACTIVISTS, et al., petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., et al. **No. 02-563.**

June 27, 2003.

Case below, 290 F.3d 1058.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

290 F.3d 1058

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

and

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L.

Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Michael Dodds; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman, Defendants,

and

Timothy Paul Dreste; Joseph L. Foreman; Charles Wysong, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Catherine Ramey; Dawn Marie Stover, Defendants-Appellants,

and

Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Donald Treshman; Charles Wysong, Defendants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.

Paul deParrie, Movant-Appellant.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds;

Joseph L. Foreman; Charles Roy McMillan; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333 and 99-35405.

Argued and Submitted En Banc Dec. 11, 2001.

Filed May 16, 2002.

As Amended on Denial of Rehearing En Banc July 10, 2002.*

Reinhardt, Circuit Judge, filed dissenting opinion in which Kozinski, Kleinfeld, and Berzon, Circuit Judges, joined.

Kozinski, Circuit Judge, filed dissenting opinion in which Reinhardt, O'Scannlain, Kleinfeld and Berzon, Circuit Judges, joined

Christopher A. Ferrara, American Catholic Lawyers Ass'n Inc., Ramsey, NJ, for defendants-appellants Donald Treshman and Monica Migliorino Miller.

Stephen J. Safranek, Richard Thompson, and Edward L. White, III, Thomas More Center for Law & Justice, Ann Arbor, MI, for defendants-appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray, and Dawn Stover.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for plaintiffs-appellees Planned

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* Judges KOZINSKI and O'SCANNLAIN voted to grant.

Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, Robert Crist, M.D., Warren Hern, M.D., Elizabeth P. Newhall, M.D., and James Newhall, M.D.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, VA.

Paul deParrie, Portland, OR, amicus curiae pro se.

Michael H. Simon, Perkins Coie LLP, Portland, OR, for amicus curiae ACLU Foundation of Oregon, Inc.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project.

Eliot D. Prescott and Jane R. Rosenberg, Assistant Attorneys General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae Anti-Defamation League, The American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc.

William A. Norris, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Los Angeles, CA, for amicus American Medical Association.

Lawrence S. Lustberg, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for amici curiae Senator Charles E. Schumer, et al.

Appeals from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ (District of Oregon).

Before: SCHROEDER, Chief Judge, and REINHARDT, KOZINSKI, O'SCANNLAIN, RYMER, KLEINFELD, HAWKINS, SILVERMAN, WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

Opinion by Judge RYMER; Dissent by Judge REINHARDT; Dissent by Judge KOZINSKI; Dissent by Judge BERZON.

RYMER, Circuit Judge.

For the first time we construe what the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, means by "threat of force." FACE gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services." 18 U.S.C. § 248(a)(1) and (c)(1)(A). This requires that we define "threat of force" in a way that comports with the First Amendment, and it raises the question whether the conduct that occurred here falls within the category of unprotected speech.

Four physicians, Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall, and

two health clinics that provide medical services to women including abortions, Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC), brought suit under FACE[1] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and numerous individuals.[2] Three threats remain at issue: the Deadly Dozen "GUILTY" poster which identifies Hern and the Newhalls among ten others; the Crist "GUILTY" poster with Crist's name, addresses and photograph; and the "Nuremberg Files," which is a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The "GUILTY" posters identifying specific physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions before they were murdered.

Although the posters do not contain a threat on their face, the district court held that context could be considered. It defined a threat under FACE in accordance with our "true threat" jurisprudence, as a statement made

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[1] We refer collectively to the plaintiffs as "physicians" unless reference to a particular party is required. In addition to FACE, the case went to trial on claims that the same conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (except that ACLA was alleged to be the RICO enterprise and was not a defendant on this claim), and on claims that the defendants conspired to violate FACE and RICO. As each claim turns on whether there were true threats without constitutional protection, the appeal and our opinion focus only on FACE.

[2] Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Stephen P. Mears, Monica Migliorino Miller, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong. We refer to them collectively as "ACLA."

when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm." Applying this definition, the court denied ACLA's motion for summary judgment in a published opinion. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW II*), 23 F.Supp.2d 1182 (D.Or.1998).[3] The jury returned a verdict in physicians' favor, and the court enjoined ACLA from publishing the posters or providing other materials with the specific intent to threaten Crist, Hern, Elizabeth Newhall, James Newhall, PPCW, or the Health Center. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW III*), 41 F.Supp.2d 1130 (D.Or.1999). ACLA timely appealed.

A panel of this court reversed. In its view, the standard adopted by the district court allowed the jury to find ACLA liable for putting the doctors in harm's way by singling them out for the attention of unrelated but violent third parties, conduct which is protected by the First Amendment, rather than for authorizing or directly threatening harm itself, which is not. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW IV*), 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir.2001). The panel decided that it should evaluate the record independently to determine whether ACLA's statements could reasonably be construed as saying that ACLA, or its agents, would physically harm doctors who

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[3] The court had previously denied ACLA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW I*), 945 F.Supp. 1355 (D.Or.1996).

did not stop performing abortions. Having done so, the panel found that the jury's verdict could not stand.

We reheard the case en banc because these issues are obviously important. We now conclude that it was proper for the district court to adopt our long-standing law on "true threats" to define a "threat" for purposes of FACE. FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them because they provided reproductive health services. Construing the facts in the light most favorable to physicians, the verdict is supported by substantial evidence. ACLA was aware that a "wanted"-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of "WANTED" posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the "Nuremberg Files" where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded. We are independently satisfied that to this limited extent, ACLA's conduct amounted to a true threat and is not protected speech.

As we see no reversible error on liability or in the equitable relief that was granted, we affirm. However, we remand for consideration of whether the punitive damages award comports with due process.

I

The facts are fully set out in the district court's order granting injunctive relief, *PPWC III*, 41 F.Supp.2d at 1131-1155, and we shall not belabor them. In sum:

> On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a "WANTED" and an "unWANTED" poster with Gunn's name, photograph, address and other personal information were published. The "WANTED" poster describes Gunn as an abortionist and invites participation by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the "unWANTED" poster states that he kills children at designated locations and "[t]o defenseless unborn babies Gunn in [sic] heavily armed and very dangerous." After Gunn's murder, Bray and Paul Hill (a non-party who was later convicted of murdering a different doctor) prepared a statement supporting Griffin's acquittal on a justifiable homicide theory, which ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover joined.

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A "**WANTED**" poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an "unWANTED" poster that Hill helped to prepare. One gives Britton's physical description together with his home and office addresses and phone numbers, and charges "crimes against humanity"; another

also displays his picture and states that "he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!" In addition to these items, a third version of the Britton "unWANTED" poster lists personal achievements and Britton's "crimes against humanity," also warning that "John Bayard Britton is considered armed and extremely dangerous, especialy [sic] to women and children." ALM, Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition supporting Hill.

Many pro-life activists in Operation Rescue condemned these acts of violence. As a result, ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover, who espoused a "pro-force" point of view, split off to form ACLA. Burnett observed, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." Organizational meetings were held in the spring of 1994, and ACLA's first event was held in August 1994. ACLA is based in Portland, Oregon, as is ALM. ALM publishes *Life Advocate*, a magazine that is distributed nationally and advocates the use of force to oppose the delivery of abortion services. Except for Bray, who authored *A Time to Kill* and served time in federal prison for conspiring to bomb ten clinics, the individual defendants were directors of ACLA and actively involved in its affairs. ALM commissioned and published Bray's book, noting that it "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." Wysong and ACLA also drafted and circulated a "Contract on the Abortion Industry," having deliberately chosen that language to allude to mafia hit contracts.

ACLA presented the Deadly Dozen poster during a January 25, 1995 press conference at the March for Life event in Washington, D.C. Bray, Burnett, Crane, Dodds, Foreman, McMillan, Murch, Ramey, Stover, Treshman and Wysong were there; Dreste later ratified the poster's release. This poster is captioned "**GUILTY**" at the top (which meant the same thing to Crane, who drafted it, as "wanted"), beneath which in slightly smaller print the poster indicates "OF CRIMES AGAINST HUMANITY." The poster continues: "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" Under the heading "THE DEADLY DOZEN," the poster identifies thirteen doctors of whom James Newhall, Elizabeth Newhall, and Warren Hern are three. The poster provides Hern's residence and the home address of James Newhall and Elizabeth Newhall; it also lists the name and home address of Dr. George Kabacy, a doctor who provided abortions at PPCW. It offers a "$5,000 REWARD" "for information leading to arrest, conviction and revocation of license to practice medicine." At the bottom the poster bears the legend "**ABORTIONIST**" in large, bold typeface. The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bullet-proof vests and take other security precautions, which they did. Knowing this, ALM reprinted the poster in the March 1995 edition of its magazine *Life Advocate* under a cover with the "grim reaper" holding a scythe; Murch printed it in his newsletter *Salt & Light;* and ACLA republished the Deadly Dozen poster at events in August 1995 and January 1996.

ACLA released the Crist poster along with five others in August 1995 at the old federal courthouse in St. Louis where the *Dred Scott* decision had been handed down. Burnett, Crane, Dreste, McMillan, Ramey, Stover and Wysong attended the event. Three of the posters identify doctors; the others identify reproductive health care clinics, one of which was a Planned Parenthood affiliate where Crist worked. The Crist poster has "**GUILTY**" in large bold letters at the top followed by "OF CRIMES AGAINST HUMANITY" in smaller font. It also gives his home and work addresses; states "Please write, leaflet or picket his neighborhood to expose his blood guilt"; offers a "$500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines"; and has "**ABORTIONIST**" in large bold type at the bottom.

At its January 1996 conference, ACLA displayed the Deadly Dozen poster, held a "White Rose Banquet" to honor prisoners convicted of anti-abortion violence, and introduced ALM's Paul deParrie to unveil the "Nuremberg Files." ACLA sent a hard copy of some of the Files to Neal Horsley (a non-party) to post on the internet, and ACLA's name appeared on the Nuremberg Files website opened in January 1997. Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. Crist, Hern and the Newhalls are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of Gunn, Patterson and Britton are struck through.

By January 1995 ACLA knew the effect that "WANTED," "unWANTED," or "GUILTY" posters had on

doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for Britton, ALM remarked of the Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, if I was an abortionist, I would be afraid."

By January 1995 the physicians knew about the Gunn, Patterson and Britton murders and the posters that preceded each. Hern was terrified when his name appeared on the Deadly Dozen poster; as he put it: "The fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the – that the posters, then, were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that – that, as night follows day, that my name was on this wanted poster . . . and that I would be assassinated, as had the other doctors been assassinated." Hern interpreted the poster as meaning "Do what we tell you to do, or we will kill you. And they do." Crist was "truly frightened," and stopped

practicing medicine for a while out of fear for his life. Dr. Elizabeth Newhall interpreted the Deadly Dozen poster as saying that if she didn't stop doing abortions, her life was at risk. Dr. James Newhall was "severely frightened" in light of the "clear pattern" of a wanted poster and a murder when there was "another wanted poster with my name on it."

The jury found for plaintiffs on all claims except for Bray and Treshman on the RICO claims.[4] The district court then considered equitable relief. It found that each defendant used intimidation as a means of interfering with the provision of reproductive health services; that each independently and as a co-conspirator published and distributed the Deadly Dozen poster, the Crist poster, and the Nuremberg Files; and that each acted with malice and specific intent in communicating true threats to kill, assault or do bodily harm to each of the plaintiffs to intimidate them from engaging in legal medical practices and procedures. The court found that the balance of hardships weighed "overwhelmingly" in plaintiffs' favor. It also found that the defendants' actions were not protected speech under the First Amendment. Accordingly, it issued a permanent injunction restraining defendants from threatening, with the specific intent to do so, any of the

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[4] On the FACE claims, the jury awarded $39,656 to Crist, $14,429 to Hern, $15,797.98 to Elizabeth Newhall, $375 to James Newhall, $405,834.86 to PPCW, and $50,243 to PFWHC from each defendant as compensatory damages and $14.5 million to Crist, $13 million to Hern, $14 million to Elizabeth Newhall, $14 million to James Newhall, $29.5 million to PPCW, and $23.5 million to PFWHC in punitive damages. On the RICO claims (after trebling), Crist was awarded $892,260; Hern, $324,657; Elizabeth Newhall, $355,454; James Newhall, $8,442; PPCW $9,131,280; and PFWHC, $1,130,466.

plaintiffs in violation of FACE; from publishing or distributing the Deadly Dozen poster and the Crist poster with specific intent to threaten the plaintiffs; from providing additional material concerning plaintiffs, with a specific intent to threaten, to the Nuremberg Files or similar web site; and from publishing or distributing the personally identifying information about the plaintiffs in the Files with a specific intent to threaten. The court also required defendants to turn over materials that are not in compliance with the injunction except for one copy of anything included in the record, which counsel was permitted to retain.

II

Before turning to the merits, we must consider the standard of review because ACLA contends that in a free speech case it is de novo. Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), ACLA submits that we must first determine for ourselves whether its speech is classic protected speech or is a "true threat" by reviewing the entire record.

Physicians assert that the standard of review for which ACLA contends comes from libel cases, but that threat cases are different; the more searching review of the record incumbent upon courts in libel cases, they urge, is inapposite to threat cases. They also point out that we have decided all of our threats cases without engaging in de novo review of the factual record. *See, e.g., United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir.1989) (*Gilbert II*) ("Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a thr[illegible]"); *United States v. Gordon*, 974 F.2d

1110, 1117 (9th Cir.1992) ("Although some of the factual circumstances surrounding the incident suggest a contrary result, the jury acted reasonably [in finding that] the threats were serious."); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 (9th Cir.1990) ("[A] rational jury could conclude that Orozco Santillan's statement ... was a threat."); *see also United States v. Hoff*, 22 F.3d 222, 224 (9th Cir.1994) (reviewing for clear error conviction for intimidating forest ranger).

We do not entirely agree with either side. It is true that our threats cases have been decided without conducting a de novo review of the factual record, but the issue was not squarely presented in any of those cases. For this reason, we cannot take it as definitively resolved.

In *Bose* (a defamation action arising out of a publication about loudspeaker systems), the Court confronted an apparent conflict between Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous, and its rule in cases raising First Amendment issues that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99, 104 S.Ct. 1949 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). The Court noted that it had previously exercised independent judgment on questions such as whether particular remarks are "fighting words," *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), and whether, as a matter of constitutional law, a motion picture is obscene. *Jenkins v. Georgia*, 418 U.S. 153, 159-61, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). In this connection, the Court observed that in

Jenkins it had rejected the notion that a jury finding (there of obscenity) "is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings"; rather, substantive constitutional limitations govern. *Bose*, 466 U.S. at 506-07, 104 S.Ct. 1949. Therefore, it concluded, appellate judges must themselves determine whether the record establishes the constitutional facts required for showing actual malice with convincing clarity in a case governed by *New York Times*. This obligation does not, however, extend to any evidence that is not germane to the actual malice (or core constitutional fact) determination. *Id.* at 514 n. 31, 104 S.Ct. 1949.

The Court revisited the issue in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). *Harte-Hanks* was a libel action against a newspaper, also governed by *New York Times*. The court of appeals had affirmed a judgment against the paper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the facts underlying the jury's finding of actual malice. Certiorari was granted to consider whether the appellate court's analysis was consistent with *Bose*. Harte-Hanks conceded that when conducting the independent review required by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility, but contended that the Supreme Court had nevertheless rejected the trial court's credibility determination in *Bose*. Justice Stevens, writing for the Court in both *Bose* and *Harte-Hanks*, noted that this was not correct; he explained that in *Bose* the Court had accepted the trial court's determination that the author of

the report at issue did not provide credible testimony, but had been unwilling to infer actual malice from the finding. *Id.* at 689 n. 35, 109 S.Ct. 2678. The *Harte-Hanks* Court went on to review the entire record, holding that given the instructions, the jury's answers to special interrogatories, and the facts that were not in dispute, the jury must have found certain testimony incredible and that from these findings, considered with the undisputed evidence, it followed that the paper acted with actual malice and that the evidence was sufficient to support such a finding.

The same rule was reiterated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), a First Amendment case involving a parade permit. As the Court explained: "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* at 567, 115 S.Ct. 2338.

We have discussed the issue a number of times, in connection with threats in *United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), *United States v. Gilbert* (*Gilbert I*), 813 F.2d 1523 (9th Cir.1987), *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994), and *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir.1996), and in defamation actions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir.1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir.1997), and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir.2001).

Merrill was prosecuted for mailing injurious articles through the mail (letters with live .22 caliber rim fire

bullets, some with the words "Kill Reagan," some with pornographic playing cards) and for threatening the life of the President in violation of 18 U.S.C. § 871. ACLA relies on that part of *Merrill* where we considered the obscenity conviction under the *Bose* standard of review. We interpreted *Bose* and *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), as allowing deferential (sufficiency of the evidence) review of findings about contemporary community standards and the offensiveness of the material, but as requiring more extensive review of the district court's findings that Miller's letters lacked serious political value. *Smith*, 431 U.S. at 305, 97 S.Ct. 1756 (whether a work lacks serious literary, artistic, political, or scientific value for purposes of an obscenity prosecution is a "determination . . . particularly amenable to appellate review"). However, we did not apply heightened review to the threats conviction. Instead, we stated:

> Whether any given form of written or oral expression constitutes a true threat for the statute's [§ 871] purposes is a question for the trier of fact under all of the circumstances. *Roy v. United States*, 416 F.2d [874,] 877-78 [(9th Cir.1969)]. A few cases may be so clear that they can be resolved as a matter of law, *e.g.*, *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664[] (1969) (conditional statement made at political rally which provoked listeners' laughter was merely "political hyperbole," and question should not have gone to jury), but most cases arising under this statute present widely varying fact patterns that should be left to the trier of fact. *United States v. Carrier*, 672 F.2d [300,] 306 [(2d Cir.1982)].

Merrill, 746 F.2d at 462-63. Under this standard we held that the district judge was not clearly erroneous in finding that the letters constituted an objectively serious threat to harm the President.

We followed *Merrill* in *Gilbert I*, 813 F.2d at 1529-30. Gilbert was charged with violating the Fair Housing Act, 42 U.S.C. § 3631(b) and (c), by mailing menacing flyers to ntimidate the director of an adoption organization responsible for the placement and adoption of black and Asian children from aiding minority children's occupancy of dwellings in Kootenai County. Noting that whether expression is a true threat is for the trier of fact, we recognized that "[w]hether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact." *Gilbert I*, 813 F.2d at 1529. Thus, "it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection." *Id.* at 1530. And following the Seventh Circuit's lead in *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.1990), we held in *Melugin* that "the issue whether the prosecution has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Melugin*, 38 F.3d at 1485.

Lovell was a § 1983 action in which a student was suspended for allegedly threatening to shoot a teacher. We acknowledged that "[d]ifferent standards are sometimes used when reviewing district court cases in which the court adjudged the constitutionality of a restriction on speech," and that a de novo review of the facts is conducted when a restriction is upheld. *Lovell*, 90 F.3d at 370.

Newton was a defamation action brought by Wayne Newton (a public figure) against NBC. It was tried to a

jury, which found actual malice. The appeal caused us specifically to consider how "to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values" in light of *Bose* and *Harte-Hanks. Newton*, 930 F.2d at 666. We observed that the "independent examination of the record" contemplated by *Bose* is "'not equivalent to a "de novo" review of the ultimate judgment itself,'" where the reviewing court makes an "original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff." *Id.* at 670 n. 10 (quoting *Bose*, 466 U.S. at 514 n. 31, 104 S.Ct. 1949). However, we also noted that as a general rule, we have conducted de novo review of the record when a restriction on speech has been upheld. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988)). We then read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review, such that we give "special deference" to credibility determinations but conduct "a more searching review of other evidence" germane to the actual malice determination. *Id.* at 671, 672.

Eastwood was another defamation action in which we engaged in an independent review of actual malice. We thought that the jury was properly instructed, but in conducting the review we explained that "it is not enough for us to determine that a reasonable jury could have found for the plaintiff – a kind of sufficiency-of-the-evidence test, permitting us to affirm even though we would have reached a different conclusion. Rather, 'First Amendment questions of "constitutional fact" compel [us to conduct a] *de novo* review.' We ourselves must be convinced that the defendant acted with malice," even though

we defer to the jury on questions of credibility. *Eastwood*, 123 F.3d at 1252 (citations omitted). *See also Hoffman*, 255 F.3d at 1186 (relying on *Eastwood*).

It is not easy to discern a rule from these cases that can easily be applied in a threats case where, by definition, a true threat is constitutionally unprotected. Indeed, FACE on its face requires that "threat of force" be defined and applied consistent with the First Amendment. Perhaps this explains why we have treated threat cases differently, explicitly holding that the question of whether there is a true threat is for the jury.

We conclude that the proper definition of a "threat" for purposes of FACE is a question of law that we review de novo. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA's favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a "threat of force" for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined "threat" and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent). We review the district court's findings with respect to injunctive relief for clear error and its conclusions of law de novo. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden no more

speech than necessary to achieve its goals. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

Given that the verdict for physicians and the injunctive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the Files constitute a "true threat" such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact – a true threat – falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

III

ACLA[5] argues that the First Amendment requires reversal because liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat. It suggests that the key question for us to consider is whether these posters can be considered "true threats" when, in fact, the posters on

[5] Treshman and Miller filed a separate brief. We treat their arguments with ACLA's, as each adopts the others' brief. An amicus curiae brief in support of reversal was also submitted on behalf of The Thomas Jefferson Center for the Protection of Free Expression. Paul deParrie submitted a pro se, non-party-in-interest brief challenging the permanent injunction entered by the district court, and an amicus brief in opposition to reconsideration of the panel opinion.

their face contain no explicitly threatening language. Further, ACLA submits that classic political speech cannot be converted into non-protected speech by a context of violence that includes the independent action of others.

Physicians[6] counter that this threats case must be analyzed under the settled threats law of this circuit. Following precedent, it was proper for the jury to take context into account. They point out that the district court limited evidence of anti-abortion violence to evidence tending to show knowledge of a particular defendant, and maintain that the objective standard on which the jury was instructed comports both with Ninth Circuit law and congressional intent. As the First Amendment does not protect true threats of force, physicians conclude, ACLA's speech was not protected.

A

We start with the statute under which this action arises. Section 248(c)(1)(A) gives a private right of action to any person aggrieved by reason of the conduct prohibited by subsection (a). Subsection (a)(1) provides:

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[6] Amicus briefs in support of affirmance were submitted on behalf of the American Medical Association; seventeen United States Senators and forty-two United States Representatives; the State of Connecticut; the Anti-Defamation League, the American Jewish Committee, and Hadassah, the Women's Zionist Organization of America, Inc.; Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project; and the ACLU Foundation of Oregon, Inc.

> (a) . . . Whoever –
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services
>
> . . .
>
> shall be subject to the . . . civil remedies provided in subsection (c). . . .

18 U.S.C. § 248(a)(1). The statute also provides that "[n]othing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

FACE does not define "threat," although it does provide that "[t]he term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him – or herself or to another." 18 U.S.C. § 248(e)(3). Thus, the first task is to define "threat" for purposes of the Act. This requires a definition that comports with the First Amendment, that is, a "true threat."

The Supreme Court has provided benchmarks, but no definition.

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing

imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.

However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other

than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts.

ACLA's position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context. *Id.* at 708, 89 S.Ct. 1399. Beyond this, ACLA points out that the posters contain no language that is a threat. We agree that this is literally true. Therefore, ACLA submits, this case is really an incitement case in disguise. So viewed, the posters are protected speech under *Brandenburg* and *Claiborne*, which ACLA suggests is the closest analogue. We disagree that *Claiborne* is closely analogous.

In March 1966 black citizens in Claiborne County made a list of demands for racial equality and integration. Unsatisfied by the response, several hundred black persons at a meeting of the local National Association for the Advancement of Colored People (NAACP) voted to place a boycott on white merchants in the area. The boycott continued until October 1969. During this period, stores were watched and the names of persons who violated the boycott were read at meetings of the NAACP at the First Baptist Church, and published in a local paper called "Black Times." These persons were branded as traitors to the black cause, were called demeaning names, and were socially ostracized. A few incidents of violence occurred. Birdshot was fired at the houses of two boycott violators; a brick was thrown through a windshield; and a flower garden was damaged. None of the victims ceased trading with white merchants. Six other incidents of arguably

unlawful conduct occurred. White business owners brought suit against the NAACP and Charles Evers, its field secretary, along with other individuals who had participated in the boycott, for violating Mississippi state laws on malicious interference with a business, antitrust, and illegal boycott. Plaintiffs pursued several theories of liability: participating in management of the boycott; serving as an "enforcer" or monitor; committing or threatening acts of violence, which showed that the perpetrator wanted the boycott to succeed by coercion when it could not succeed by persuasion; and as to Evers, threatening violence against boycott breakers, and as to the NAACP because he was its field secretary when he committed tortious and constitutionally unprotected acts. Damages for business losses during the boycott and injunctive relief were awarded.

The Court held that there could be no recovery based on intimidation by threats of social ostracism, because offensive and coercive speech is protected by the First Amendment. "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection." 458 U.S. at 933, 102 S.Ct. 3409. There was some evidence of violence, but the violence was not pervasive as it had been in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941). Accordingly, the Court made clear that only losses proximately caused by unlawful conduct could be recovered. Further, civil liability could not be imposed consistent with the First Amendment solely on account of an individual's association with others who have committed acts of violence; he must have incited or authorized them himself.

For the same reasons the Court held that liability could not be imposed on Evers for his participation in the boycott itself, or for his threats of vilification or ostracism. However, the merchants also sought damages from Evers for his speeches. He gave one in April 1966, and two others in April 1969. In the first, he told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him; he also said that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. In his April 19, 1969 speech, Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night. And on April 21, Evers gave another speech to several hundred people calling for a total boycott of white-owned businesses and saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Court concluded that the "emotionally charged rhetoric" of Evers's speeches was within the bounds of *Brandenburg*. It was not followed by violence, and there was no evidence – apart from the speeches themselves – that Evers authorized, ratified, or directly threatened violence. "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Claiborne*, 458 U.S. at 929, 102 S.Ct. 3409. As there was not, the findings were constitutionally inadequate to support the damages judgment against him and, in turn, the NAACP.

Claiborne, of course, did not arise under a threats statute. The Court had no need to consider whether Evers's statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused

business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression "break your neck") the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States*, 416 F.2d 874 (9th Cir.1969), whether a Marine Corps private made a true threat for purposes of 18 U.S.C. § 871 against the President, who was coming to his base the next day, by saying: "I am going to get him." We adopted a "reasonable speaker" test. As it has come to be articulated, the test is:

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.

United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir.1990).

We have applied this test to threats statutes that are similar to FACE, *see, e.g.*, *United States v. Gilbert* (*Gilbert II*), 884 F.2d 454, 457 (9th Cir.1989) (Fair Housing Act banning threat of force to intimidate person based on race and housing practices, 42 U.S.C. § 3631); *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir.1987) (threats against the President, 18 U.S.C. § 871); *Merrill*, 746 F.2d at 462-63 (same); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir.1992) (threat to kill a former President, 18 U.S.C. § 879); *Orozco-Santillan*, 903 F.2d at 1265 (threats to assault a law enforcement officer with intent to intimidate, 18 U.S.C. § 115); *Melugin*, 38 F.3d at 1483-84 (threat to influence judicial proceeding under Alaska state law); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir.1990) (threat to disrupt conference under California's Unruh Act); and *Lovell*, 90 F.3d at 371 (9th Cir.1996) (§ 1983 action involving threat to shoot teacher). Other circuits have, too.[7] We see no

[7] *See, e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir.1997) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir.1997)

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reason not to apply the same test to FACE.[8]

(Second Circuit approach to threats, adopted in *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is objective test and requires assessing whether a reasonable recipient of statement would construe it as threat in light of context); *United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir.1991) (statement is threat under 18 U.S.C. § 871 if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir.1994) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would interpret the statement as threat); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if recipient placed in reasonable fear of bodily harm); *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if reasonable recipient of message would interpret it as expression of intent to harm); *United States v. Hartbarger*, 148 F.3d 777, 782-83 (7th Cir.1998) (cross burning is threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir.2000) (placing Ryder truck in driveway of abortion clinic is threat under FACE because, in light of entire factual context, person would reasonably conclude that the act expresses an intent to harm); *United States v. Magleby*, 241 F.3d 1306, 1311-13 (10th Cir.2001) (cross burning is threat under the Fair Housing Act, 42 U.S.C. § 3631, because reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir.1983) (statement is threat under 18 U.S.C. § 871 if reasonable person would construe statement as expression of intent to harm); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed.Cir.1986) (threat evaluated by reasonable listener considering numerous factors).

Although all now apply an objective standard, several circuits have a "reasonable listener" test while others have a "reasonable speaker" test as we do. The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.

[8] Both the House and Senate specifically referred to *Gilbert's* interpretation of the Fair Housing Act's threat provision in adopting FACE's quite similar text. H. Rep. No. 103-306, 12 n. 19 (1993), 1994 U.S. Code Cong. & Admin. News at 699, 709 n. 19; S.Rep. No. 103-117, at 29 (1993).

Under our cases, a threat is "an expression of an intention to inflict evil, injury, or damage on another." *Gilbert II*, 884 F.2d at 457; *Orozco-Santillan*, 903 F.2d at 1265. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265; *see also Mitchell*, 812 F.2d at 1255 (citing *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *Merrill*, 746 F.2d at 462; *Roy*, 416 F.2d at 876). "'The fact that a threat is subtle does not make it less of a threat.'" *Orozco-Santillan*, 903 F.2d at 1265 (quoting *Gilbert II*, 884 F.2d at 457). A true threat, that is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment." *Id.* (citing *Merrill*, 746 F.2d at 462).

It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. *Orozco-Santillan*, 903 F.2d at 1265 n. 3; *Gilbert II*, 884 F.2d at 456-57; *Mitchell*, 812 F.2d at 1256 (upholding § 871 conviction of defendant with no capacity to carry out threat); *Roy*, 416 F.2d at 877.[9] Other circuits are in accord.[10] Nevertheless, we are urged

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[9] We have held that 28 U.S.C. § 876, which criminalizes knowingly mailing any communication containing a threat to injure, is a specific intent crime. *United States v. Twine*, 853 F.2d 676 (9th Cir.1988); *United States v. King*, 122 F.3d 808 (9th Cir.1997). However, we were not defining "threat" or considering what a true threat is, and we made it clear that specific intent or ability to carry out the threat is not an essential element. *King*, 122 F.3d at 810 (quoting *Twine*, 853 F.2d at 681 n. 4).

[10] *See, e.g., United States v. Francis*, 164 F.3d 120, 123 (2d Cir.1999) (rejecting addition of substantive intent requirement to objective test); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir.1997) (same);

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to adopt a subjective intent requirement for FACE. In particular, amicus ACLU Foundation of Oregon, Inc., advocates a subjective intent component to "require evidence, albeit circumstantial or inferential in many cases, that the speaker actually *intended* to induce fear, intimidation, or terror; namely, that the speaker intended to threaten. If a person did not intend to threaten or intimidate (*i.e.*, did not intend that his or her statement be understood as a threat), then the speech should not be considered to be a 'true threat,' unprotected by the First Amendment." However, this much is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate. The "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Gilbert I*, 813 F.2d at 1529 (construing the Fair Housing Act's threat provision, 42 U.S.C. § 3631, which is essentially the same as FACE's). No reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual intention to carry it out, "an apparently serious threat may cause the mischief or evil toward which the statute was in part directed." *Gilbert II*, 884 F.2d at 458 (quoting *Roy*, 416 F.2d at 877).

The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when

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United States v. Aman, 31 F.3d 550, 553-56 (7th Cir.1994) (same); *United States v. Patrick*, 117 F.3d 375, 377 (8th Cir.1997) (same); *United States v. Martin*, 163 F.3d 1212, 1215-16 (10th Cir.1998) (same). *But see United States v. Patillo*, 438 F.2d 13, 15 (4th Cir.1971) (including subjective intent element in § 871). The Fourth Circuit has abandoned this approach in its other true threat cases.

the speech is public rather than private. However, for years our test has focused on what *a reasonable speaker* would foresee the *listener's* reaction to be under the circumstances, and that is where we believe it should remain. *See Madsen*, 512 U.S. at 773, 114 S.Ct. 2516 (noting that "threats . . . however communicated, are proscribable under the First Amendment, and indicating that display of signs "that could be interpreted as threats or veiled threats" could be prohibited"). Threats are outside the First Amendment to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent *to inflict* bodily harm; the harm is going to happen anyway.

Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publicly rather than privately. As *Madsen* indicates, threats are unprotected by

the First Amendment "however communicated." *Madsen*, 512 U.S. at 753, 114 S.Ct. 2516.[11]

Therefore, we hold that "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.

B

Although ACLA does not believe we should reach this point, if we do it submits that no claim was made out even under "true threats" cases. First, it argues that other

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[11] Judge Reinhardt chides us for failing to accord public speech more protection than private speech. He misses the point. *Threats*, in whatever forum, may be independently proscribed without implicating the First Amendment. *See e.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (so indicating in case involving public protest against abortion providers); *Madsen*, 512 U.S. at 774, 114 S.Ct. 2516 (same); *Kelner*, 534 F.2d 1020 (JDL press conference in connection with public demonstration about the Palestine Liberation Organization and its leader); *Hart*, 212 F.3d 1067 (public protest against abortion providers).

Nor does *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), turn on a public/private distinction, as Judge Kozinski's dissent suggests. No heightened scrutiny was given to the professor's speech on account of the fact that it had to do with a campus debate. Rather, the *Orozco-Santillan* test was applied, and we concluded that even though there was some violent content to his writings and cartoons, in the context of the underground campus newspaper in which they appeared, they would be perceived as hyperbole instead of as a serious expression of intent to inflict bodily harm.

threats cases were criminal actions against someone who made a real threat directly to others, not political speech as is the case here. It contrasts what it calls "a threat plus context" present in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), and in other out-of-circuit cases,[12] with the absence of a direct threat in this case. However, our cases do not require that the maker of the threat personally cause physical harm to the listener. In *Orozco-Santillan*, we made it clear that the speaker did not need to be able to carry out the threat. Likewise in *Mitchell*, the speaker could not possibly have done so. In *Gilbert*, the threatening letter mentions neither the intended victim nor who would carry out the threat. No case to our knowledge has imposed such a requirement,[13] and we decline to

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[12] It relies on *United States v. Viefhaus*, 168 F.3d 392 (10th Cir.1999) (threat that bomb will be activated in 15 pre-selected major cities); *United States v. Schiefen*, 139 F.3d 638 (8th Cir.1998) (personal letter sent to judge); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir.1990) (telephone calls and wanted posters sent directly to Jewish National Fund stating "death to the Fucking JNF"); *United States v. Cooper*, 865 F.2d 83 (4th Cir.1989) (scoping out areas in Washington, D.C. to blow Rajiv Gandhi's brains out); *United States v. Kosma*, 951 F.2d 549 (3d Cir.1991) (threat that 21 guns are going to put bullets through President Reagan's heart and brain); *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976) (statement over radio that people are trained who are out now and intend to make sure that Arafat is assassinated); *United States v. Sovie*, 122 F.3d 122 (2d Cir.1997) (reiterating Second Circuit test that "true threat" is one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir.1997) (silver bullets are coming; considered in context, appeared to be a threat).

[13] To the contrary, in *Viefhaus*, for example, the threat consisted of a hotline message from an unnamed person that violent acts would be executed by unnamed persons. In *Khorrami*, the purveyor of a "Crimes Against Humanity" poster made no statement that he would be the one to implement the threat. And in *United States v. Bellrichard*, 994 F.2d

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now. It is the making of the threat with intent to intimidate – not the implementation of it – that violates FACE.

We do not understand *Dinwiddie* to hold anything different. *Dinwiddie* was also a civil suit under FACE. Mrs. Dinwiddie made comments to Crist outside his clinic, warning "Robert, remember Dr. Gunn . . . This could happen to you . . . He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. She also said: "[Y]ou have not seen violence yet until you see what we do to you." *Id.* Writing for the Eighth Circuit, Judge Richard S. Arnold explained that in applying FACE's prohibition on using "threats of force," courts or juries must differentiate between "true threats" and protected speech. The alleged threat must be analyzed in light of its entire factual context to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future. As outlined in the opinion, the Eighth Circuit considers a number of factors when deciding whether statements constitute threats of force: the reaction of the recipient and of other listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence, but the list is not exhaustive and the presence or absence of any of these things is not dispositive. *Id.* at 925.

1318 (8th Cir.1993), letters warned that God or unnamed parties would kill the addressees. The same is true of *Kelner*, where the court noted that it was not necessary under § 875(c) (prescribing a communication containing a threat) for the government to prove that Kelner had a specific intent or a present ability to carry out his threat. 534 F.2d at 1023.

The court concluded that although Mrs. Dinwiddie did not specifically say to Dr. Crist, "I am going to injure you," the statements in context, and Crist's reaction to them, show that they were "threats of force" that "intimidated" Crist. The court also noted that the fact that Mrs. Dinwiddie did not specifically say to Crist that *she* would injure him does not mean that her comments were not "threats of force." *Id.* at 925 n. 9. Accordingly, the court upheld an injunction ordering Mrs. Dinwiddie to stop violating FACE (which, as it pointed out, would have a *de minimis* effect on her ability to express herself) and approved the injunction's nationwide scope.

ACLA also maintains that "context" means the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement – not two weeks of testimony as occurred here in the district court. Otherwise, ACLA submits, FACE is facially invalid. However, none of our cases has limited "context" to explaining ambiguous words, or to delivery. We, and so far as we can tell, other circuits as well, consider the whole factual context and "all of the circumstances," *Merrill*, 746 F.2d at 462, in order to determine whether a statement is a true threat. ACLA points to *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), but the Second Circuit's view is not to the contrary, as we noted in *Lovell*. *Lovell*, 90 F.3d at 372. The defendant in *Kelner*, who threatened to assassinate Yasser Arafat during a radio broadcast that also contained protected political expression, argued that this insulated his threat from prosecution; the court observed that this was not the case "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened,

as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. In *Kelner* as well as in *Lovell*, the threatening statement was considered in context to determine if it were a true threat or not. *See United States v. Malik*, 16 F.3d 45, 50 (2d Cir.1994) (once there is sufficient extrinsic evidence to show that an ordinary and reasonable recipient would interpret letter as threat, case should go to the jury).

Indeed, context is critical in a true threats case and history can give meaning to the medium. Use of Ryder trucks – which the Eighth Circuit found to be a true threat in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000) – is an example that is strikingly similar to the use of "wanted"-type posters in this case. Hart, who was a known anti-abortion activist, parked two Ryder trucks in the driveways of an abortion clinic. He was prosecuted and convicted of violating FACE. The court held that Hart had threatened the clinic to intimidate it by using Ryder trucks, because a Ryder truck had been used in the Oklahoma City bombing of the Murrah Federal Building. Hart knew the clinicians knew this and would fear for their lives. Thus, use of the Ryder truck was a true threat. Like the poster format here, the Ryder truck in *Hart* was a symbol of something beyond the vehicle: there, a devastating bomb; in this case, murder.[14]

ACLA's contention that allowing consideration of context beyond the direct circumstances surrounding delivery of the words themselves creates a facial invalidity in FACE and the Hobbs Act is unavailing. Of the courts to

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[14] *See also, e.g., United States v. Magleby*, 241 F.3d 1306 (10th Cir.2001) (cross burning).

consider the constitutionality of threats statutes, including the United States Supreme Court in *Watts*, all have upheld constitutionality and ACLA points to none that has disallowed consideration of context.[15] This makes sense, because without context, a burning cross or dead rat mean nothing. In any event, the requirement of intent to intimidate cures whatever risk there might be of overbreadth.

Nor does consideration of context amount to viewpoint discrimination, as ACLA contends. ACLA's theory appears to be that because the posters did not contain any threat on their face, the views of abortion foes are chilled more than the views of abortion-right proponents because of the random acts of violence committed by some people against abortion providers. However, FACE itself is viewpoint neutral. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir.1998) ("The Act punishes anyone who engages in the prohibited conduct, irrespective of the person's viewpoint and does not target any message based on content. 'The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.'") (quoting *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C.Cir.1996)). Moreover, ACLA could not be liable under FACE unless *it* made a true threat *with the intent to intimidate* physicians. Thus it is

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[15] *See, e.g., United States v. Weslin*, 156 F.3d 292 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658 (7th Cir.1998); *United States v. Bird*, 124 F.3d 667 (5th Cir.1997); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir.1997); *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir.1996); *Dinwiddie*, 76 F.3d 913; *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995).

making a threat to intimidate that makes ACLA's conduct unlawful, not its viewpoint.

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a "wanted"-type poster, ACLA deliberately identified Crist on a "GUILTY" poster and intentionally put the names of Hern and the Newhalls on the Deadly Dozen "GUILTY" poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.

The Nuremberg Files are somewhat different. Although they name individuals, they name hundreds of them. The avowed intent is "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in

PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

C

ACLA next argues that the true threat instructions require reversal because they permitted consideration of motive, history of violence including the violent actions of others, and the defendants' subjective motives as part of context. We have already explained why it is proper for the whole factual context and all the circumstances bearing on a threat to be considered. The court also instructed the jury to consider evidence presented by the defense of non-violence

and permissive exercise of free speech. That the contextual facts may have included the violent actions of others does not infect the instruction, because the issue is whether a reasonable person should have foreseen that the Crist Guilty Poster, the Deadly Dozen Poster, and the Nuremberg Files, would be interpreted as a serious threat of harm by doctors who provide abortions and were identified on them.

ACLA also contends that the district court employed the wrong standard of intent, allowing the jury to find in physicians' favor regardless of ACLA's subjective intent. The court instructed: "A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." This language is taken from *Orozco-Santillan*, 903 F.2d at 1265, is an accurate statement of our law, and is faithful to the objective standard we use for determining whether a statement is a true threat. For reasons we have already explained, we decline to read into FACE (or the Hobbs Act) a specific intent to threaten violence or to commit unlawful acts in addition to the intent to intimidate which the statute itself requires.

ACLA additionally faults the court for failing to provide any standard of intent because the elements instruction merely states that FACE is violated by "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" physicians' ability to provide reproductive health services. As best we can tell, this boils down to a complaint that the instruction did not say "in order to" between "threat of force" and "to intimidate." However, this is the plain import of the instruction.

ACLA further suggests that the conspiracy instruction, combined with the "attempt to intimidate" instruction, could have resulted in liability for an "attempt to threaten" without proof of an actual threat.[16] We do not see how, because the jury had to find a true threat before reaching any other FACE or RICO issues. ACLA also posits that the standard form instruction, "[i]f you find a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did," had the effect in this case of violating the rule of *Claiborne* that one cannot be held accountable for the speech of others by reason of mere association, absent ratification or adoption of it. However, the jury was instructed that a person does not become a conspirator

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[16] ACLA argues more broadly that no claim for conspiracy to violate FACE exists, but we decline to consider the issue because it is raised for the first time on appeal. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 996 (9th Cir.1998). It had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy). Failing to raise the issue until now, absent any exceptional circumstances or change in the law, prejudices both the plaintiffs and the process. Considerable time and resources were devoted to litigating these claims to verdict. In any event, we cannot see that substantial injustice occurred. FACE came into being in part because of "organized," "concerted" campaigns by "groups" to disrupt access to reproductive health services, S.Rep. No. 103-117, at 6-7 (1993), and the instruction effectively channeled the jury away from finding defendants liable for mere association and instead required it to find that each defendant threatened physicians intending to intimidate them or willfully joined with others to do so. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (freedom of association protected by First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights).

merely by associating with one or more persons who are conspirators; rather, one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some object or purpose of it. There is no right to associate with others to engage in activities that are unlawful and unprotected by the First Amendment, as the making of true threats to intimidate providers of reproductive health services is. *Madsen*, 512 U.S. at 776, 114 S.Ct. 2516 (upholding injunction restraining abortion protestors acting in concert with defendants). The Seventh Circuit had occasion to consider (and reject) a similar argument made by abortion protestors who had been convicted of conspiring to violate FACE in *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir.1998). It explained that the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights. As in *Wilson*, we are not persuaded that the instructions allowed any defendant in this case to be found liable for threats to intimidate for which he or she was not responsible. They either participated in making them, or agreed that they should be made.

Finally, we note that the jury was instructed that "[e]ven speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment." It was reminded that "plaintiffs' claims are based only on the three statements I have listed for you," and that it

should determine the case as to each defendant and each claim separately. Accordingly, the court did not abuse its discretion in formulating the instructions, nor was the jury incorrectly instructed as a matter of law on true threats or the elements of FACE.[17]

D

ACLA joins in Treshman's assertion that the court erroneously admitted prejudicial evidence by permitting: an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA's two posters to be "serious threats"; references to non-party violence; introduction of defendants' arrests; physicians' counsel to tell the jury about Bray's invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of "Defensive Action petitions" by five or six of the individual defendants; an exhibit with Rev. Sullivan's hearsay opinion that ACLA is a "cancer" which prolifers must "cut out immediately" before it "destroys the pro-life movement" to

[17] ACLA cites other errors in the Hobbs Act and RICO instructions but offers no authority in support. Neither does it indicate that any objection on these issues was preserved. Its argument on appeal is not developed. In any event, the instructions appear to track model instructions and are not obviously wrong. For these reasons, we do not discuss these challenges and summarily reject them.

ACLA also contends that the court compromised its right to a fair trial by telling the jury that the United States Supreme Court has declared that women have a constitutional right to abortion, and no one is permitted to violate the law because of their views about abortion. It objected on the ground that the charge was "death to us" but makes no substantial argument on appeal why there was reversible error on this account. We summarily reject this argument as well.

remain in the exhibit books; and by permitting deposition summaries to be introduced. ACLA recognizes that evidentiary rulings are normally reviewed for an abuse of discretion, but argues that in cases raising First Amendment issues appellate courts must independently examine the record for evidentiary errors which penalize political speech or allow "a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citation omitted). We decline ACLA's invitation to review evidentiary rulings de novo. No case of which we are aware suggests that the obligation to examine the record independently extends so far. Nor do we believe that appellate judges should retry cases, as ACLA's proposal would have us do. Accordingly, we review the district court's evidentiary rulings in this case, as we do evidentiary rulings in all cases, for abuse of discretion. None appears.

Testimony about the law enforcement officers' response to the Crist and Deadly Dozen "GUILTY" posters had some tendency to show the physicians' state of mind when they found out they were named on "wanted"-type posters, as well as to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated. Both are non-hearsay purposes. No testimony was allowed about what officers thought the posters meant. That FBI agents and United States Marshals advised physicians to take security precautions relates to how Crist, Hern, and the Newhalls perceived their own safety. The court admonished the jury that it should not conclude that these agencies had decided that the threats were "true threats." We assume that the jury followed the court's limiting instruction, *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899-900 (9th Cir.1996), which cured

whatever potential there may have been for an unduly prejudicial effect from admission of this testimony.

ACLA's knowledge of prior violence and its effect on reproductive health services providers bore directly on its intent to intimidate physicians, and was limited by the district court to that relevant purpose. Bray's invocation of the Fifth Amendment was not improperly admitted as to him in a civil trial. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998). Co-conspirator statements were admissible so long as they were connected to the conspiracy and the jury found that the statements were made in furtherance of it. The same is true of the Defensive Action petitions, which were clearly admissible against those defendants who signed them and as to others with whom the signatories were conspiring. Speech does not become inadmissible to show context or intent simply because standing alone it is protected. *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (First Amendment does not prohibit evidentiary use of speech to show motive or intent); *Dinwiddie*, 76 F.3d at 918, 925, n. 10 (although advocacy of view that violence is justifiable is protected, it was appropriate for district court to consider plaintiff's awareness of defendant's advocacy of lethal force in determining whether defendant intimidated him with threats of force). Terry Sullivan was a the Chicago meeting that led to the founding of ACLA, and to the extent that he expressed any opinion about how ACLA was undermining a commitment to nonviolence, it was part of what happened at the time, was relevant to show that ACLA knew how its actions were being interpreted, and was within the district court's discretion to admit once Sullivan's testimony had laid a foundation. Neither Sullivan nor Flip Benham was available to testify at trial; as both had been

examined at a deposition, their former testimony was not excluded by the hearsay rule, Fed.R.Evid. 804(b), and its presentation in the form of summaries was within the court's discretion under Rule 611(a). *Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir.1991) (requiring deposition summaries not an abuse of discretionary authority to regulate conduct of civil trials); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986) (same); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (same); MANUAL FOR COMPLEX LITIGATION, Third, § 22.331 (1995).[18]

E

ACLA also joins Treshman's argument that mistrials should have been granted because a juror objected to use

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[18] After noting that the decision to admit deposition testimony at all is within the sound discretion of the district court, Judge Flaum explained in *Oostendorp*:

> It follows that the court may control the manner in which deposition testimony is presented; indeed, trial courts are charged to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time. . . ." Fed.R.Evid. 611(a). The district court adopted its rule to serve these objectives, and we agree that requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611. We therefore conclude that the district court's requirement was not an abuse of its discretionary authority to regulate the conduct of civil trials.

Oostendorp, 937 F.2d at 1179-80.

We hold only, for these reasons, that the district court did not abuse its discretion in requiring summaries in lieu of transcripts. As there was no challenge along the lines of Judge Berzon's dissent to the particular summaries that were presented, we have no occasion to consider whether the court did or did not err in receiving them.

of the word "abortionist"; the judge made a remark about Bill Clinton in admonishing a witness to tell the truth; jurors were invited to watch a criminal sentencing proceeding; three jurors had a conversation with one of the physicians during a lunch hour; and physicians' counsel likened defendants to the Oklahoma City and World Trade Center bombers and Islamic terrorists during his closing. We are asked to review the record de novo on this issue as well, although ACLA acknowledges that the normal standard for refusing to grant mistrials is abuse of discretion. We decline to change our standard, and see no reversible error.

When a juror informed the court that the defense's use of the term "abortionist" was becoming distracting, the district court instructed the jury that "[i]t is perfectly legal, and proper, and within any free speech right, for one group, that is opposing another group, to refer to them in the terms they choose. And it's clear the pro-life people, traditionally, I believe, call abortion providers abortionists. So, there should not be any adverse reaction to these people using the lingo and terminology of their protest." The jurors all responded that they could live with that, and keep an open mind with respect to all the evidence. There was no objection to the process, and no abuse of discretion on account of taking no further action. Similarly, after learning of a chance encounter in the courthouse elevator between Elizabeth Newhall and three jurors in the presence of defense counsel, the court inquired whether the jurors had discussed anything substantive and whether their judgment would be impaired by the contact. They responded negatively and the court acted within its discretion in taking no further action. The court also instructed that anything the jury may have seen

or heard when the court was not in session is not evidence, and that the case was to be decided solely on the evidence received at trial. Finally, ACLA fails to explain why allowing the jurors to watch two sentencing proceedings was objectionable or prejudicial, and we cannot see how it was.

The judge himself recognized that his Clinton reference was inappropriate. He apologized to the jury about it, and explained that the court was attempting to suggest to the witness that she should just go ahead and answer a question. (The witness had remarked to counsel after being impeached with a prior inconsistent statement under oath, "I am not sure what you mean by truthful.") The judge told jurors to put his comment out of their minds, permitted the defense to re-open direct examination to allow the witness to explain her prior answer, and told the jury again in his final instructions that any remarks of his were not to be taken as an indication of how much weight to give the testimony of any witness. Whatever the impropriety, it was cured.

As might be expected, closing argument was robust on both sides; the court gave all counsel considerable latitude. Images of famous and infamous figures alike were evoked. The district judge was in the best position to decide whether any particular reference went too far. The court reminded the jury that counsels' statements were not evidence, and we cannot say that the defense was so prejudiced by the argument that a mistrial should have been granted.

F

Having concluded that "threat of force" was properly defined and that no trial error requires reversal, we

consider whether the core constitutional fact – a true threat – exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hern, and the Newhalls, are without First Amendment protection. The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE. Nevertheless, we review the evidence on true threats independently.

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. Both differ from prior posters in that the prior posters were captioned "WANTED" while these are captioned "GUILTY." The text also differs somewhat, but differences in caption or words are immaterial because the language itself is not what is threatening. Rather, it is use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that constitutes the threat. Because of the pattern, a "wanted"-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of reproductive health services, as a serious threat of death or bodily harm. After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those

named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (comparing language used in political arena to language used in labor disputes). In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.

The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused. *Cf. Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (no true threat in political speech that was conditional, extemporaneous, and met with laughter); *Claiborne*, 458 U.S. at 928, 102 S.Ct. 3409 (spontaneous and emotional appeal in extemporaneous speech protected when lawless action not incited).

The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is

made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenburg*, *Watts* or *Claiborne*. However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

As a direct result of having a "GUILTY" poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families. ACLA had every reason to foresee that its expression of intent to harm (the "GUILTY" poster identifying Crist, Hern, Elizabeth Newhall and James Newhall by name and putting them in the File that tracks hits and misses) would elicit this reaction. Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.

This is the point of the statute and is conduct that we are satisfied lacks any protection under the First Amendment.

Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*. ACLA may have been staking out a position for debate when it merely advocated violence as in Bray's *A Time to Kill*, or applauded it, as in the Defense Action petitions. Likewise, when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or

vilification to advocate a political position. *Claiborne*, 458 U.S. at 903, 909-12, 102 S.Ct. 3409. But, after being on "wanted"-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.

Like "fighting words," true threats are proscribable. We therefore conclude that the judgment of liability in physicians' favor is constitutionally permissible.

IV

ACLA submits that the damage award must be reversed or limited to the compensatory damages because the punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We have since discussed the subject in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety. Therefore, we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of *Exxon Valdez*.

V

After trial, the district court found that each defendant used intimidation as a means of interfering with the

provision of reproductive health services and acted with malice and with specific intent in threatening physicians. It found that physicians remain threatened by ACLA's threats, and have no adequate remedy at law. The court concluded that physicians had proved by clear and convincing evidence that each defendant acting independently and as a co-conspirator prepared and published the Deadly Dozen Poster, the Crist Poster, and the Nuremberg Files with specific intent to make true threats to kill or do bodily harm to physicians, and to intimidate them from engaging in legal medical practices. It "totally reject[ed] the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services." *PPCW III*, 41 F.Supp.2d at 1154. Applying *Madsen*'s standard, the court found that ACLA's actions were not protected under the First Amendment. Accordingly, it permanently enjoined each of the defendants, their agents, and all persons in active concert with any of them who receive actual notice, from threatening, with the specific intent to do so, Crist, Hern, Dr. Elizabeth Newhall, Dr. James Newhall, PPCW and PFWHC in violation of FACE; publishing, republishing, reproducing or distributing the Deadly Dozen Poster, or the Crist poster, or their equivalent, with specific intent to threaten physicians, PPCW or PFWHC; and from providing additional material concerning Crist, Hern, either Newhall, PPCW or PFWHC to the Nuremberg Files or any mirror web site with a specific intent to threaten, as well as from publishing the personally identifying information about them in the Nuremberg Files with a specific intent to threaten. The court also ordered ACLA to turn over possession of materials that are not in compliance with the injunction.

ACLA complains principally about the restraint on possessing the posters. Pointing to *Stanley v. Georgia*, 394 U.S. 557, 567, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where the Court observed that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits," ACLA contends that the injunction treats the posters worse than obscenity. However, the posters in this case are quite different from a book; the "wanted" – type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense the posters' status is more like conduct than speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-82, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (explaining distinction between speech and conduct, and holding that expressive aspect of conduct does not exempt it from warranted regulation). The First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat. The court heard all the evidence, which included testimony that some defendants obstructed justice and ignored injunctions. Accordingly, we cannot say that the turn-over order was broader than necessary to assure that this particular threat will not be used again.

ACLA also suggests that the injunction is an improper prior restraint on speech because it prohibits dissemination of the posters. It is not. The Supreme Court has rejected the notion that all injunctions which incidentally affect expression are prior restraints. *Madsen*, 512 U.S. at 764 n. 2, 114 S.Ct. 2516; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n. 6, 117 S.Ct. 855,

137 L.Ed.2d 1 (1997). Like *Madsen* and *Schenck*, the injunction here was not issued because of the content of ACLA's expression, but because of prior unlawful conduct.

The terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them. This leaves huge room for ACLA to express its views.[19]

CONCLUSION

A "threat of force" for purposes of FACE is properly defined in accordance with our long-standing test on "true threats," as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." This, coupled with the statute's requirement of intent to intimidate, comports with the First Amendment.

We have reviewed the record and are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on

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[19] Assuming that he has standing, deParrie's challenges fail for most of the same reasons. The district court found that he was an employee and agent of ALM and it is proper for the injunction to apply to him as well. Fed.R.Civ.P. 65.

the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.

Therefore, we affirm the judgment in all respects but for punitive damages, as to which we remand.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

REINHARDT, Circuit Judge, with whom KOZINSKI, KLEINFELD, and BERZON, Circuit Judges, join, dissenting:

I concur fully in both Judge Kozinski's and Judge Berzon's dissents. The differences between the majority and dissenting opinions with respect to the First Amendment are clear. I write separately to emphasize one point: the majority rejects the concept that speech made in a

political forum on issues of public concern warrants heightened scrutiny. *See* Majority Op. at 1076. This rejection, if allowed to stand, would significantly weaken the First Amendment protections we now enjoy. It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different from purely private speech directed at an individual. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome. For this reason alone, I would be compelled to dissent.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute,[1]

[1] For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 1070-75. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 1076-77, or that we defer to the factfinder on questions of historical fact in First Amendment cases, *id.* at 1067-68.

masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 1076-77 (emphasis added).[2] The emphasized language is crucial, because it is not illegal – and cannot be made so – merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By

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[2] Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L.Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . .

commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir.1983) (quoting *Claiborne Hardware*, 458 U.S. at 911, 102 S.Ct. 3409). We noted – referring to *Claiborne Hardware* again – that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat – a task the majority acknowledges we must perform de novo, Maj. op at 1070 – its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 1079-80; *see also id.* at 1085-86 (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority

relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 1079; *see also id.* at 1085-86. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F.Supp.2d 1130, 1134-35 (D.Or.1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual – Paul Hill, who is not a defendant in this case – participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.[3]

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[3] The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 1080. The majority does point out that doctors were listed separately, and that the names of doctors who were

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The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 1079. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 1089-90 *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves – or individuals acting in concert with them – will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and

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killed or wounded were stricken or greyed out, *id.* at 1080, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Noto v. United States*, 367 U.S. 290, 297-99, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

that's my concern."[4] *Planned Parenthood of the Columbia/ Willamette, Inc. v. Am. Coalition of Life Activists*, No. CV-95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the – you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were – you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that – that you are on a list of people to – who have been brought to public attention in this way. I felt that this was a – a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671 JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech – especially political speech, as this clearly was – may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969),

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[4] In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F.Supp.2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

conspiracy to commit criminal acts, *Scales v. United States*, 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34, 102 S.Ct. 3409. The majority cites not a scintilla of evidence – other than the posters themselves – that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927, 102 S.Ct. 3409 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original).[5] *Claiborne Hardware* in fact goes much

[5] Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that

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farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915, 102 S.Ct. 3409. As the Court explained, "Since respondents would impose liability on the basis of a public address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment – we approach this suggested basis for liability with extreme care." *Id.* at 926-27, 102 S.Ct. 3409. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a

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simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people – political dissidents are often unpopular – but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898, 102 S.Ct. 3409. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900, 102 S.Ct. 3409. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900, 102 S.Ct. 3409.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903, 102 S.Ct. 3409.[6] The names were collected and "read

[6] It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909, 102 S.Ct. 3409. Evers made several speeches containing threats – including those of physical violence – against the boycott violators. *Id.* at 900 n. 28, 902, 926-27, 102 S.Ct. 3409. In addition, a number of violent acts – including shots fired at individuals' homes – were committed against the boycott breakers. *Id.* at 904-06, 102 S.Ct. 3409.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893, 102 S.Ct. 3409. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95, 102 S.Ct. 3409.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888, 102 S.Ct. 3409. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts – including violence and threats of violence – of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott

organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34, 102 S.Ct. 3409.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, 102 S.Ct. 3409, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n. 28, 102 S.Ct. 3409;
- discipline would be taken against the violators, *id.* at 902, 927, 102 S.Ct. 3409;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, 102 S.Ct. 3409;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended.*" *Id.* at 927, 102 S.Ct. 3409 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927, 102 S.Ct. 3409. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), because it resulted in no immediate harm to anyone. *Id.* at 927-28, 102 S.Ct. 3409. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). *Id.* at 928 n. 71, 102 S.Ct. 3409. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, 102 S.Ct. 3409, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves – which suggested violence against boycott violators – might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929, 102 S.Ct. 3409. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless

action, they must be regarded as protected speech." *Id.* at 928, 102 S.Ct. 3409. Absent "evidence – apart from the speeches themselves – that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929, 102 S.Ct. 3409. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had not been shown – by evidence aside from the political speeches themselves – that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts – the identity of those who violated the boycott – and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that

> "we," presumably including himself, would "break your damn neck." 458 U.S. at 902, 102 S.Ct. 3409. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past.[7]

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900, 102 S.Ct. 3409 (April 1966 speech), at 902, 102 S.Ct. 3409 (April 1969 speeches).[8] By

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[7] The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F.Supp.2d at 1135. The district court did not find that defendants participated in the preparation of Burt's posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

[8] On April 1, 1966, Evers made a speech "directed to all 8,000 plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928, 102 S.Ct. 3409. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them

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contrast, the record here contains *no* evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.[9]

The opinion's effort to distinguish *Claiborne Hardware* does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches (including the expression 'break your neck') the implication of . . . directly threatening unlawful conduct." Maj. op. at 1073. As explained above, the majority is quite wrong on this point, *see* pp. 1063 *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, 102 S.Ct. 3409, and he said that "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

It is possible – as the majority suggests – that Evers's statements were "hyperbolic vernacular," Maj. op. at

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racist stores, we're gonna break your damn neck.'" *Id.* at 902, 102 S.Ct. 3409.

[9] The majority mentions that "[o]ne of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 1073. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F.Supp.2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

1073,[10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 1085. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04, 102 S.Ct. 3409. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n. 28, 102 S.Ct. 3409. The majority's opinion simply cannot be squared with *Claiborne Hardware*.

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[10] In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 1073. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06, 102 S.Ct. 3409. Although these were the four incidents about which the most information was available – perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify – they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at 1402-04; *see also id.* at 1406-07 (Thomas, J., concurring in the judgment); *id.* at 1407-09 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 1411-12 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at 1401-02; *see also id.* at 1403-04 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 1101-02, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 122 S.Ct. at 1403-04. If

political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a

reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see wnat *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat.[11]

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[11] Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion

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We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication – a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper[12] – or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222.[13]

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clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F.Supp.2d at 1155-56.

[12] *See The Godfather* (Paramount Pictures 1972).

[13] In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved – a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration – could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden*'s holding that public statements are entitled to more protection than private ones.

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a *public* political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees.[14] Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84.[15] The

[14] These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

[15] In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir.1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her

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majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non-violent* statements by defendants to be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction.[16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them

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own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir.1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir.1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir.1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir.1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n. 6 (9th Cir.1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

[16] Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001).

from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court – the broad and uncritical deference to the judgment of a jury – will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court

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In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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March 27, 2006

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No. 02-563

In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioners' communications -- two posters and a portion of a website -- are protected expression under the First Amendment.

2. Whether a public communication that contains no explicit threat can be deemed a "true threat" under the First Amendment because the communication is comparable in content and format to earlier communications by third parties that preceded killings of persons identified in those communications, and a person who made the instant communication would consequently have reasonably foreseen that it would cause the persons named in it to fear for their safety.

3. Whether a website that lists the names of abortion providers, with markings indicating which of those individuals have been killed or wounded, may constitute a "true threat" under the First Amendment.

4. Whether the court of appeals affirmed the jury's liability finding and compensatory damages award based on a theory on which the jury was not instructed.

5. Whether the court of appeals upheld a damages award for public speech based on a negligence standard.

6. Whether the court of appeals applied the correct standard of appellate review in determining whether petitioners' statements were "true threats" under the First Amendment.

7. Whether the district court's injunction is an impermissible restraint on free speech.

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In the Supreme Court of the United States

No. 02-563

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners challenge a damages award and injunction entered against them in a civil action under the Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U.S.C. 248, which proscribes, *inter alia*, "intentionally * * * intimidat[ing] or interfer[ing] with" a person by "threat of force" because the person is "providing reproductive health services." Petitioners contend that the communications that formed the basis for the judgment against them are political advocacy protected by the First Amendment. The court of appeals held that those communications are

"true threats," which the First Amendment does not protect. In so holding, the court applied a legal standard for distinguishing "true threats" from protected speech that is correct and consistent with this Court's decisions. This case does not, therefore, warrant the Court's review.

1. Petitioners are abortion opponents who published various documents targeting physicians who perform abortions. In January 1995, at a press conference in Washington, D.C., petitioner American Coalition of Life Activists (ACLA) unveiled a poster captioned "GUILTY OF CRIMES AGAINST HUMANITY." Pet. App. 10a. Under the heading "THE DEADLY DOZEN," the poster identified 13 physicians who provided abortions, including three of the respondents, and offered a reward "for information leading to arrest, conviction and revocation of license to practice medicine." *Id.* at 10a-11a. The poster listed the home addresses of some of the physicians. *Ibid.* The day after the poster was released, the FBI offered protection to the physicians identified on the poster and advised them to take security precautions. *Id.* at 11a. The poster was reprinted in a magazine and a newsletter published by petitioners and was displayed at other ACLA events. *Ibid.*

Later that year, ACLA unveiled six posters at an event in St. Louis, including one directed at respondent Dr. Robert Crist. Pet. App. 11a. The Crist poster, captioned "GUILTY OF CRIMES AGAINST HUMANITY," contained Crist's photograph and his work and home addresses, and stated, "Please write, leaflet or picket his neighborhood to expose his blood guilt." *Id.* at 11a, 116a. The poster offered a reward "to any

ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." *Id.* at 11a. The poster had "Abortionist" in large bold type at the bottom. *Ibid.*

In January 1996, in connection with an event honoring individuals incarcerated for anti-abortion violence, petitioners released the "Nuremberg Files," a collection of information about approximately 200 abortion providers (including four of the respondents) and approximately 200 others identified as abortion supporters, including judges (among them six current or former Members of this Court), politicians, and abortion-rights activists. Pet. App. 11a, 193a; Lodging 37-41. ACLA stated that the names, photographs, and addresses of individuals were being collected in order to hold trials in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." Pet. App. 116a-117a. Petitioners gave the Nuremberg Files to an anti-abortion activist, who posted them on an internet website. *Id.* at 11a. On the website, the names of physicians who had been murdered were crossed out, the names of physicians who had been wounded were printed in gray type, and the names of physicians continuing to perform abortions were printed in black type. A legend explained the meaning of those distinctions. *Id.* at 11a-12a, 32a-33a, 125a n.2, 138a; Lodging 19-25.

Neither the posters nor the Nuremberg Files contained any explicitly threatening language. Pet. App. 39a, 54a, 190a. The physicians who were the subjects of the posters and the Nuremberg Files nonetheless feared for their safety, because the personal information and photographs made them easily identifiable and because three other physicians had recently been killed after they were identified in similar posters. *Id.* at 32a,

222a-223a. In 1993, Dr. David Gunn, a physician who previously had appeared on "WANTED" and "unWANTED" posters containing his name, address, and photograph, was shot and killed by an abortion opponent. *Id.* at 9a. In 1994, Dr. John Bayard Britton was murdered by an abortion opponent, Paul Hill, who had helped to make "unWANTED" posters containing Dr. Britton's home and work addresses and photograph. *Id.* at 9a, 141a-142a. Dr. George Patterson, a third physician who had appeared on a "WANTED" poster, was shot and killed in 1993, although the motive for the killing is unknown. *Id.* at 9a, 55a.[1]

Petitioners were aware of the fear that the posters generated among physicians who appeared on them. For example, petitioner Charles Wysong stated that one of the "two things" that physicians who quit performing abortions "feared the most" was "having their picture put on a poster." Pet. App. 12a. Petitioner Michael Bray stated that a physician who quit performing abortions after having appeared on a "Not Wanted" poster did so because he was "bothered and afraid." *Ibid.* And petitioner Andrew Burnett stated, with respect to the impact of "Wanted" and "Guilty" posters, "if I was an abortionist, I would be afraid." *Ibid.*

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[1] After the killing of Dr. Gunn, petitioner Michael Bray and Paul Hill prepared a petition urging the killer's acquittal on justifiable homicide grounds, which was joined by seven other individual petitioners and petitioner ALM. Pet. App. 9a, 140a-141a. After the killing of Dr. Britton, six individual petitioners and ALM signed a similar petition calling for the killer's acquittal. *Id.* at 9a-10a, 142a. When Hill was convicted of the killing, petitioner ALM praised Hill and encouraged others to emulate him as a "hero." *Id.* at 142a.